82-957

No. 82-

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

DOUBLEDAY SPORTS, INC.,

Petitioner,

v.

EASTERN MICROWAVE, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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Dated: December 8, 1982

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QUESTION PRESENTED FOR REVIEW[1]

1. Whether the Court of Appeals misconstrued the plain language and ignored the legislative history of the Copyright Revision Act of 1976 by freeing from liability any commercial enterprise that retransmits, and hence performs to the public, over-the-air broadcasts of copyrighted works without authorization of the copyright holder, even though the retransmitter chooses and actively markets the signal retransmitted based on its substantive content and thereby exploits the commercial value of the copyright holder's property.

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[1] Doubleday & Company, Inc., is the parent corporation of petitioner Doubleday Sports, Inc.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is not yet reported. It is reproduced at App. 1a-18a. The decision of the United States District Court for the Northern District of New York, 534 F. Supp. 533 (N.D.N.Y. 1982), is reproduced at App. 19a-30a.

JURISDICTION

This case arises under the Copyright Revision Act of 1976, 17 U.S.C. §§ 101 *et seq.* Federal jurisdiction is founded upon 28 U.S.C. §1338. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1254(1) and 2101(c) to review the decision of the court of appeals rendered October 13, 1982.

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Copyright Revision Act, 17 U.S.C. §§ 101 *et seq.*, are set forth at App. 38a-47a.

STATEMENT OF THE CASE

This case involves the first judicial interpretation of a key provision of the Copyright Revision Act of 1976 (the "Act") to reach this Court. The court of appeals interpreted Section 111(a)(3) of the Act in a way that expands a statutory exemption from liability for copyright infringement beyond the limits imposed by Congress and thereby erodes the copyright interests that the Act was intended to protect. As a result, copyright holders across the nation face substantial losses arising from the unauthorized exploitation of their copyrighted works.

In the Copyright Revision Act, Congress reaffirmed and strengthened the exclusive right of the copyright holder to the commercial exploitation of his copyrighted works. Act, § 106(4). In so doing, Congress overruled two decisions of this Court—*Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390 (1968), and *Teleprompter Corp.* v. *CBS, Inc.*, 415 U.S. 394 (1974)—in order to impose copyright liability on cable television systems for their retransmissions of distant television signals. The Act also granted cable systems a compulsory license for such retransmissions, requiring them to pay a royalty to copyright holders as set by statute. Other retransmitters were left subject to full copyright liability, with a few narrow exceptions.

One of those exceptions is contained in Section 111(a)(3) of the Act, 17 U.S.C. § 111(a)(3). That section provides that retransmissions of copyrighted broadcasts are exempt from copyright liability so long as the retransmitting enterprise selects neither the initial broadcast nor its recipients, and merely

provides channels of communication for others (App. 39a).[1] The legislative history of Section 111(a)(3) shows that it was sponsored by, and adopted at the behest of, the American Telephone and Telegraph Company—a "passive" carrier that retransmits signals solely at the direction of its customers.

Despite the plain language of Section 111(a)(3) and its unambiguous legislative history, the court of appeals broadened the statutory exemption to embrace any retransmission activity, so long as the retransmitter does not physically alter or edit the signal retransmitted. That decision is plainly incorrect. Congress enacted an exemption intended to shelter only those entities that provide retransmission facilities for the carriage of signals selected by their customers. The court below has immunized from copyright liability entities, like the respondent here, that select the signals themselves and profit by selling those signals (together with their copyrighted works) to the public.

Eastern Microwave

Respondent Eastern Microwave, Inc. ("EMI") is a so-called "resaler" that appropriates the signals of conventional television stations and retransmits them for a fee to nearly 1300 cable television systems having approximately 5,000,000 individual subscribers across the country. Unless EMI qualifies for the Section 111(a)(3) exemption, it is subject to copyright liability.

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[1] Section 111(a)(3) provides pertinently:

"(a) CERTAIN SECONDARY TRANSMISSIONS EXEMPTED.—The secondary transmission of a primary transmission embodying a performance or display of a work is not an infringement of copyright if—

* * *

"(3) the secondary transmission is made by any carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others . . . ."

Among the signals selected by EMI for retransmission is that of WOR-TV, a New York City television station. WOR-TV carries games of the New York Mets, to which petitioner Doubleday Sports, Inc. ("Doubleday Sports") owns the copyright.

EMI retransmits its signals both by overland microwave relay facilities and by an orbiting earth satellite. EMI's microwave retransmissions are confined to the northeastern United States and include the signals of 15 conventional broadcast stations in addition to WOR-TV. By contrast, EMI's satellite retransmissions, which began in April 1979, cover the entire country. Because of the limited number of transponders available for lease on the orbiting satellite (which is owned by an affiliate of RCA), EMI has retransmitted only the signal of WOR-TV.

EMI selected WOR-TV as its one station for satellite retransmission, based on the substantive content of WOR's programming, including prominently its broadcasts of Mets baseball games. Thereafter, EMI conducted a so-called marketing "survey" that offered EMI's customers no choice among various signals, but consisted instead of an elaborate marketing effort for the WOR-TV signal. In contrast to the cable systems contacted by EMI during its "survey"—and EMI contacted every system in the country having more than 5000 subscribers—only one or two made unsolicited requests for the retransmission of WOR-TV. Subsequent to its initial marketing effort, EMI mounted an extensive advertising and promotional campaign to sell the WOR-TV retransmission to additional cable customers.[2]

As noted, the conventional television stations whose signals are appropriated by EMI are subject to copyright liability; they must negotiate licenses with copyright holders in order to broadcast their works. The cable television systems to which EMI retransmits have a compulsory license; they pay statutorily prescribed royalties for their licenses to the Copyright Royalty

[2] Samples of EMI's promotional activities are set forth in the Appendix (App. 48a-55a).

Tribunal, which eventually distributes the proceeds to copyright holders. Act, § 111(d)(3).

However, EMI has no license of any kind: it has no agreement with Doubleday Sports to exploit telecasts of Mets games, and because it is not a cable system it has no compulsory license under the 1976 law. Prior to this litigation, EMI never compensated Doubleday Sports or any other copyright holder for its use of their copyrighted works. In essence, EMI receives a free ride at the expense of those who devote their talents and efforts to the production and exhibition of copyrighted programs.

Doubleday Sports

Doubleday Sports has owned and operated the New York Mets baseball team since February 1980. As the owner of the Mets, Doubleday Sports holds the copyright interest in telecasts of the team's baseball games. Like other copyright holders, Doubleday Sports has licensed its interest to various broadcasters. It has contracted with WOR-TV, the Mets' "flagship station," to telecast numerous games during each regular baseball season; it has licensed certain cable broadcasts of Mets games in the New York City metropolitan area; and, through the Commissioner of Baseball, it has granted exclusive rights in specified games to two national television networks and a national cable network.

By their nature and particularly by virtue of their nationwide sweep, EMI's retransmissions of Mets games to its 1300 cable customers and their millions of subscribers across the country interfere with Doubleday Sports' existing contracts. EMI's retransmissions necessarily undermine Doubleday Sports' ability to negotiate licenses for future broadcasts of Mets games, including particularly cablecasts arranged by agreement between the carrying system on the one hand and Doubleday Sports or professional Baseball on the other.

Proceedings Below

In March 1981, Doubleday Sports notified EMI that its unauthorized retransmissions of Mets games infringe Double-

day Sports' copyright. Thereupon, EMI instituted suit in the United States District Court for the Northern District of New York, seeking a declaratory judgment that it is a "passive" carrier, exempt from copyright liability under Section 111(a)(3) of the Copyright Revision Act.[3] EMI later amended its complaint to assert additionally that its retransmissions are not "public performances" within Sections 101 and 106 of the Act, and therefore do not infringe Doubleday Sports' copyright.

The district court (McCurn, J.) rejected both of EMI's contentions, and granted Doubleday Sports' motion for summary judgment dismissing EMI's complaint. With respect to Section 111(a)(3), the district court found the record "clear that EMI selected the primary transmission" of WOR-TV (App. 28a). The district court further concluded that EMI also had selected the recipients of its retransmissions and that its promotion of the WOR-TV signal extended well beyond the mere provision of channels of communication for others (App. 28a-30).

The court of appeals (per Markey, J., C.C.P.A., sitting by designation) reversed, without reaching the "public performance" issue. The Court acknowledged that EMI had selected the WOR-TV signal to the exclusion of all others that it might have transmitted via satellite, but concluded that the only type of "selection" proscribed by Section 111(a)(3) involves the physical alteration or editing of the signal itself (App. 11a-12a). The court also concluded that EMI had not chosen the recipients of its transmissions, and that its marketing of the WOR-TV signal had not exceeded the mere provision of channels of communication for others.

In so ruling, the court of appeals assumed—incorrectly—that it was addressing issues never considered by Congress (App. 5a). The court's decision therefore was predicated not on the specific statutory language or its accompanying legislative history, but on what the court erroneously surmised to be the broad policy objectives of the Copyright Act.

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[3] Jurisdiction in the district court was founded on 28 U.S.C. § 1338.

REASONS FOR GRANTING THE WRIT

In the Copyright Revision Act of 1976, Congress overruled prior decisions by this Court that had immunized cable systems from copyright liability, and adopted a comprehensive scheme of protection for copyrighted works. The few exemptions carved out from the revised statutory scheme were limited to narrowly defined circumstances. Section 111(a)(3) embodies one such exemption. The Section applies only to retransmitting entities, like the telephone company, that are passive in relation to the signals they retransmit—that do no more than retransmit what their customers direct.

The court of appeals expanded this exemption from copyright liability to cover an entrepreneurial "resaler" that has picked a single broadcast signal, based on its substantive programming content, and marketed that signal at a profit for retransmission to others. The court adopted a construction of Section 111(a)(3) in conflict with the plain language and legislative history of the provision. It misread the policies underlying the Act. And it relied on unfounded assumptions that are inconsistent with the findings of the appropriate government agencies.

The consequences of the decision below are far-reaching. The court of appeals' ruling deprives thousands of copyright holders of control over their copyrighted works, in contravention of the basic premise of the Act, whenever the signals of conventional broadcasting stations are picked up for retransmission. The value of copyrights subjected over the holder's objection to such widespread, even nationwide dissemination will deteriorate to insignificance.

I. THE COURT OF APPEALS DISREGARDED THE PLAIN LANGUAGE AND LEGISLATIVE HISTORY OF THE COPYRIGHT REVISION ACT

1. This Court has held repeatedly that "the meaning of a statute must, in the first instance, be sought in the language in which the act is framed." *Caminetti* v. *United States,* 242 U.S.

470, 485 (1917).[4] The court of appeals did not merely skip that step; it overrode the plain language of the Copyright Act.

The central issue before the court of appeals was whether EMI, in the words of Section 111(a)(3), exercises "direct or indirect control over . . . the selection of the primary transmission." WOR-TV's signal unquestionably is a "primary transmission,"[5] and the court conceded that EMI's choice of the WOR-TV signal is a "type of 'selection'" (App. 11a). The district court, in a conclusion left undisturbed by the court of appeals, held that EMI's performances are to "the public" within the meaning of the Act (App. 22a-26a), and the court of appeals intimated strongly that it agreed with that ruling (App. 14a-15a n.16).

Nonetheless, the court of appeals concluded that EMI's selection of WOR-TV is not the type "intended to be precluded under Section 111(a)(3)" (App. 11a). That impermissible type of selection would occur, according to the court of appeals, only if EMI physically alters or edits the signal retransmitted.[6]

The error of the court below begins with its violation of the "fundamental canon of statutory construction . . . that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin* v. *United States*, 444 U.S. 37, 42 (1979). In common parlance, the term "select" does not mean to "alter" or to "edit"; it means to "choose." EMI indisputably chooses the signal of WOR-TV,

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[4] *Accord: TVA* v. *Hill*, 437 U.S. 153, 173, 184 n.29 (1978); *Southeastern Community College* v. *Davis*, 442 U.S. 397, 405 (1979); *Greyhound Corp.* v. *Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978); *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 201 (1976).

[5] Section 111(f) defines "primary transmission" as

> "a transmission made to the public by the transmitting facility whose signals are being received and further transmitted by the secondary transmission service, regardless of where or when the performance or display was first transmitted."

[6] For its overland microwave transmissions, EMI retransmits the excerpted signal of WCBS-TV to supplement the signals of stations that do not broadcast 24 hours a day. The court of appeals did not explain why, even under its own standard, that activity does not disqualify EMI from the Section 111(a)(3) exemption.

over all others, for retransmission by satellite. It does so on the basis of the marketability of that signal as determined by its programming content.[7]

When Congress intended to prohibit the alteration or editing of the primary transmitter's signal, it said so. In Section 111(c)(3) of the Act, using language that bears no resemblance to Section 111(a)(3), Congress proscribed such alterations by cable systems.[8]

2. The court of appeals also disregarded the legislative history of the Copyright Act. The legislative record shows that Section 111(a)(3) evolved as a congressional response to a request by the telephone company that its passive carrier services be insulated from copyright liability.[9] The court overlooked that in drafting Section 111(a)(3), Congress rejected the concept that "selection" should be limited to the alteration or editing of the signal transmitted. In clarifying what entities would qualify as "passive" carriers entitled to invoke the Section 111(a)(3) exemption, the Senate Judiciary Committee stated:

> "Since cable television *necessarily selects* the primary transmissions which are transmitted, and controls the recipients of the secondary transmission, the ex-

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[7] It is equally clear that in selecting and aggressively promoting the WOR-TV signal, EMI engages in activities that do not "consist solely of providing wires, cables, or communications channels for the use of others." Act, § 111(a)(3). Even if EMI's promotional efforts are "normal business activities," as the court of appeals thought (App. 13a n.15), that fact would not remove those efforts from the statutory proscription.

[8] Section 111(c)(3) provides pertinently:

> "[T]he secondary transmission to the public by a cable system of a primary transmission made by a broadcast station ... and embodying a performance or display of a work is actionable as an act of infringement ... if the content of the particular program in which the performance or display is embodied ... *is in any way willfully altered by the cable system through changes, deletions, or additions.*" (Emphasis supplied.)

[9] Letter of Walter J. Derenberg to Herbert Fuchs, Counsel, Subcomm. No. 3, House Judiciary Comm., dated January 27, 1966 (reproduced at App. 56a-64a); H.R. 4347, § 111(a)(1)(C), 89th Cong., 2d Sess. (1966); H.R. Rep. No. 2237 accompanying H.R. 4347, 89th Cong., 2d Sess. 35 (1966).

> emption of this subclause would in no case apply to them." S. Rep. No. 983, 93d Cong., 2d Sess. 131 (1974) (emphasis supplied). *Accord:* H.R. Rep. No. 83, 90th Cong., 1st Sess. 53 (1967).

The only "selection" undertaken by most cable systems is the choice of the conventional television signals they retransmit. That activity, without more, suffices to disqualify cable systems from claiming an exemption from copyright liability. EMI should be disqualified on the same basis. Otherwise, cable systems will "select" the WOR-TV signal when they choose EMI's retransmission of it, but EMI's choice of that same signal to retransmit to the cable systems will not constitute a "selection." Congress plainly did not intend such an anomalous result.

3. Disregarding both Congress' careful choice of language and the clear legislative record, the court of appeals concluded that Congress could not have meant what it plainly said in Section 111(a)(3). In the court's view, if "station selection" sufficed to disqualify EMI from the exemption provided by the Section, the exemption "would be denied to any carrier that did not retransmit every television broadcast of every television station in the country" (App. 11a). That is not correct. RCA, for example, does not relay every television signal in the country by satellite, but nonetheless it is entitled to the statutory exemption because it is merely making its transmission facilities available to its customers—including EMI—without regard to the substantive content of the signals retransmitted. RCA, like the telephone company, is a true common carrier that Congress intended to exempt from copyright liability. The telephone company and similar entities fit the description of "passive" carriers because they exercise no control over, and have no interest in, the selection of the material they retransmit.

By contrast, the record here is undisputed that EMI first selected the WOR-TV signal for satellite retransmission on the basis of the signal's substantive content and then marketed the signal on that basis to its potential cable customers. As the district court aptly put it, the telephone company "markets its services; EMI markets a product"—the WOR-TV signal (App.

30a). To hold that EMI's selectional activity, based on the signal's substantive programming content, falls outside the exemption of Section 111(a)(3) would not undermine the right of passive carriers to invoke that provision.

II. THE COURT OF APPEALS' DECISION SUBVERTS THE POLICIES UNDERLYING THE COPYRIGHT REVISION ACT

The court of appeals supposed that the task before it was to deal with a situation not anticipated by Congress, to fill a gap in "statutes enacted before adoption of the involved communications arrangements" at issue (App. 5a). But there is no gap in the statutory scheme. Contrary to the court's supposition that "the so-called 'resale carriers' are somewhat new in the common carrier world" (App. 12a), resalers such as EMI were retransmitting the signals of conventional television stations via overland microwave relay during the entire period that copyright revision was under legislative consideration. EMI was retransmitting the WOR-TV signal as early as 1965 (App. 3a).[10] Congress undoubtedly knew of such retransmissions. Nonetheless, the statute and its legislative history reveal not the slightest indication that Congress intended to grant such retransmitters a blanket immunity from copyright liability.

The advent of satellite technology did not alter the function performed by resalers. It merely afforded them access to a nationwide rather than a regional market. The technological innovation thus amplified existing encroachments on the interests of copyright holders, encroachments that Congress had not exempted from copyright liability. The advance of technology cannot obscure the critical fact that Congress considered and dealt with the problem of intermediate retransmitters—and exempted only passive carriers.

1. The court of appeals discerned, and fixed as its guidepost, an overriding "public interest . . . in a continuing supply of varied programming to viewers" (App. 16a). The court thereby put conveniently to one side the basic objective of the

[10] As noted, Doubleday Sports did not acquire the Mets until 1980.

copyright system—to afford the copyright owner a reasonable measure of control over the commercial exploitation of his work in its exhibition for profit to the public.[11] That objective surely is frustrated by permitting resalers to appropriate the off-the-air broadcasts of copyrighted material without compensation to the copyright holders and over their objection.

Even if the court of appeals had correctly assessed the congressional objective, a holding that EMI is liable for infringement would not interfere with the continued supply of programming to cable viewers. The court below *assumed* that to apply Section 111(a)(3) as it is written would impose on resalers "unworkable" separate negotiations with copyright holders (App. 15a). But no evidence in the record supports that assumption, and it is hardly a proper subject for judicial notice.

In arriving at its conclusion, the court effectively substituted its judgment for that of the Register of Copyrights and the National Telecommunications and Information Administration. Both agencies previously have found that the participants in the market, particularly satellite resalers like EMI, can protect their interests by negotiating rights in the open market.[12] In addition, because WOR-TV routinely negotiates licenses with the copyright holders of the programming it transmits, there is no apparent reason that EMI, working in concert with WOR-TV, could not do so as well. In any event, the commercial interests

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[11] As this Court recognized in *Goldstein* v. *California*, 412 U.S. 546, 555 (1973):

> "An author who possesses an unlimited copyright may preclude others from copying his creation for commercial purposes without permission. In other words, to encourage people to devote themselves to intellectual and artistic creation, Congress may guarantee to authors and inventors a reward in the form of control over the sale or commercial use of copies of their works."

[12] Statement of Barbara Ringer, Register of Copyrights, Hearings Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the House Comm. on the Judiciary, 96th Cong., 1st Sess. 23 (1979); Testimony of David Ladd, Register of Copyrights, Hearings on the Copyright Act of 1976 Before the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. (1981); U.S. Dept. of Commerce, National Telecommunications and Information Admin., *Cable Copyright: Alternatives to the Compulsory License*, 73, 137 (Dec. 1981).

of EMI and its customers can be preserved without intervention by the courts to insulate them from copyright liability.

2. Far from furthering the objectives of the Copyright Act, the court of appeals' decision has upset the careful balance struck by Congress between the interests of copyright owners and those of the cable television industry. As noted, under the 1976 Act cable systems are required to pay a royalty for each transmission of copyrighted works. In return, the cable systems hold a compulsory license, subject to a number of statutory limits.

As of 1976, there were technological limits as well. As noted, the regional overland microwave system was well established, and Congress plainly was aware of its existence. But no *nationwide* system for retransmitting copyrighted works to cable stations existed, and Congress did not anticipate the introduction of nationwide satellite networks.[13] Thus, it was thought at the time that, particularly in view of the narrow scope of Section 111(a)(3), the Copyright Revision Act would preserve the central element of copyright owners' interest— a substantial measure of control over the dissemination of protected material.

The decision below threatens to nullify that central element of control. Once a copyright owner licenses his work to *any* local television station, resalers like EMI can expropriate the station's signal and so saturate the nationwide market with the copyrighted work that negotiation of other licenses will become impossible. The copyright owner's only alternative will be to withhold his work from the conventional television broadcast market. The copyright owners' loss of ability to

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[13] Hearings Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice, *supra*, n.12, at 23:

> "In enacting section 111(a)(3), Congress certainly did not consider the then unanticipated activities of superstations and satellite relay services when it exempted traditional common carriers from copyright liability" (remarks of Register of Copyrights).

See also Hearings Before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce, 96th Cong., 1st Sess., Vol. IV 700 (1979).

control the exploitation of their copyrighted works will be substantial, and the "public interest" in a continuing supply of creative programming on free television will be undermined.

3. Finally, the court of appeals justified its decision on the ground that imposing copyright liability on intermediate retransmitters "would produce a result never intended by Congress, namely a substantially increased royalty payment to copyright owners with no increase in the number of viewers" (App. 17a). The court did not indicate where it found a supposed congressional policy that copyright holders should be compensated only once for the public exploitation of their works, even if more than one infringer profits from that exploitation. Even a cursory reading of the Act and its legislative history reveals the contrary, most particularly in the provision permitting copyright holders to recover *both* damages and infringers' profits. Act, § 504(b). *See also* Act, §§ 101, 106, 501(a); S. Rep. No. 473, 94th Cong., 1st Sess. 59 (1975).

In this case, WOR-TV is one exploiting entity; distant cable systems receiving the signal are another; EMI is a third.[14] Doubleday Sports' receipt of royalties from each of the three would be entirely consistent with the statutory scheme. In the analogous area of musical compositions under Section 106 of the Act, the rights holder receives multiple payments from the sheet-music publisher, the record company, and the radio station that plays the recording, even if all three versions of the copyrighted work reach the hands (and ears) of the same members of the consuming public. In short, the court of appeals misapprehended the basic objectives of the Copyright Revision Act.

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[14] The court of appeals suggested that unless EMI were immunized as a passive carrier, RCA, as the owner of the satellite transponder by which EMI retransmits WOR-TV, also would be required to pay a royalty (App. 17a-18a n.19). This statement betrays a fundamental misunderstanding of Section 111(a)(3). Unlike EMI, and like the telephone company, RCA is a passive carrier. It merely retransmits what its customers order, without regard to the substantive content of those retransmissions. As such, RCA qualifies for the statutory exemption.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: December 8, 1982

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CERTIFICATE OF SERVICE

In accordance with Rules 19.3 and 28.5 of the Rules of the United States Supreme Court, I hereby certify that three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit were delivered by hand to the following counsel for the appellant Eastern Microwave, Inc. in the Court of Appeals, on this 8th day of December, 1982:

ARNOLD P. LUTZKER, ESQ.
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LEONARD H. BECKER

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 1403—August Term, 1981
(Argued August 9, 1982 Decided October 13, 1982)
Docket No. 82-7243

EASTERN MICROWAVE, INC.,
Plaintiff-Appellant,

—v.—

DOUBLEDAY SPORTS, INC.,
Defendant-Appellee.

Before:

VAN GRAAFEILAND and PIERCE, *Circuit Judges,*
and MARKEY, *Chief Judge of the U.S. Court of Customs and Patent Appeals.**

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* Chief Judge Howard T. Markey, U.S. Court of Customs and Patent Appeals, sitting by designation.

Appeal from the United States District Court for the Northern District of New York, Honorable Neal P. McCurn, District Judge; District Court No. 81-CV-303.

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MARKEY, *Chief Judge,* United States Court of Customs & Patent Appeals:

Appeal from a judgment of the district court for the Northern District of New York, denying plaintiff's and granting defendant's motion for partial summary judgment, holding that a retransmitter of television signals publicly performed a copyrighted work among those signals and was not an exempt carrier. We reverse.

Background

Plaintiff, Eastern Microwave, Inc. (EMI) is licensed by the Federal Communications Commission (FCC) to provide services as a communications common carrier. EMI's services include the retransmission of the television signals of broadcast stations to markets outside the service areas of the broadcast stations. Retransmission is accomplished by converting broadcast signals into microwave signals and relaying the microwave signals via satellite or a string of line-of-sight terrestrial microwave repeater stations. Retransmitted signals are delivered by EMI to the headends of the customers of its transmitting services, cable television (CATV) systems, which then reconvert the microwave signals to television signals for distribution to and viewing by the CATV system's subscribers.[1]

EMI has been retransmitting the original television signals of WOR-TV of New York City by repeater stations since 1965, and more recently by both repeater stations and satellite. WOR-TV has not objected to that retransmission.

Doubleday Sports, Inc. (Doubleday), owner of The New York Mets baseball team, contracts with WOR-TV to broadcast approximately 100 Mets games per season. It is undisputed that The Mets, i.e., Doubleday, owns the copyright in the audiovisual work represented by the Mets games. Since 1965, EMI has retransmitted the entirety of WOR-TV's signals, without selection among programs and without modification or mutilation in any manner of the signals received and retransmitted. Since 1980, when WOR-TV became a twenty-four hour channel, EMI has retransmitted all twenty-four hours of WOR-TV programming, with no editing or selection among programs.[2] Hence, EMI's retransmission of WOR-TV's television

[1] EMI also delivered its microwave signals to two hotels and a casino in Las Vegas.

[2] Before WOR-TV became a twenty-four hour channel, EMI retransmitted the signals of WCBS-TV, New York, when WOR-TV was off the air.

signals includes the Mets games, along with numerous other copyrighted audiovisual works. EMI did not request permission of Doubleday or of any other copyright owner to retransmit the signals of WOR-TV.

In March of 1981, EMI was notified by Doubleday of the latter's view that retransmission of WOR-TV Mets game broadcasts infringed Doubleday's copyright. Thereupon, EMI instituted this action, seeking a declaratory judgment that it was a passive carrier exempt from copyright liability under 17 U.S.C. § 111(a)(3)[3] of the Copyright Act of 1976 (Act). Doubleday moved for partial summary judgment declaring EMI's retransmissions non-exempt, and for dismissal of the complaint. EMI cross-moved for partial summary judgment denying Doubleday's motion and granting judgment for EMI. EMI amended its complaint, adding a contention that its transmissions are not "public performances" and that it does not therefore infringe Doubleday's right to display the copyrighted works publicly as required by 17 U.S.C. § 106(5).[4]

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[3] 17 U.S.C. § 111(a)(3) provides:

The secondary transmission of a primary transmission embodying a performance or display of a work is not an infringement of copyright if—

(3) The secondary transmission is made by any carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others: *Provided*, that the provisions of this clause extend only to the activities of said carrier with respect to secondary transmissions and do not exempt from liability the activities of others with respect to their own primary or secondary transmissions; . . .

[4] 17 U.S.C. § 106(5) provides:

Subject to sections 107 through 108, the owner of a copyright under this title has the exclusive rights to do and to authorize any of the following:

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

The district court, stating that the parties did not dispute that EMI "performs" the WOR-TV signals, held that EMI's retransmissions were to the public, and that EMI is not exempt because it selected WOR-TV's signals, exercised control over recipients of its retransmissions, and did not limit its activities to providing wires, cables, or other communications channels for the use of others. The district court granted Doubleday's motion and denied EMI's.

Issue

The dispositive issue is whether EMI's retransmission activity is exempt under 17 U.S.C. § 111(a)(3), supra, note 3.[5]

Opinion

This case, one of first impression in this circuit, has its genesis in the burgeoning technological advances of the communications industry. Like others before it, the case requires interpretation and application of statutes enacted before adoption of the involved communications arrangements. Because the issues framed by the cross motions for summary judgment involve application of legal standards under the Act to the relatively undisputed facts concerning the nature of EMI's activities, plenary review of the district court's judgment is appropriate. *United Artists Television, Inc.* v. *Fortnightly Corp.*, 377 F.2d 872, 874 n.2 (2d Cir. 1967) *rev'd on other grounds*, 392 U.S. 390, 88 S.Ct. 2084, *reh. denied*, 393 U.S. 902, 89 S.Ct. 65 (1968). *See also Baranow* v. *Gibraltor Factors Corp.* (*In re Hygrade Envelope Corp.*), 366 F.2d 584, 587-89 (2d Cir. 1966).

Confronted with the need to divine and apply the intent of Congress, and with a statute enacted in the technological milieu of an earlier time, we "look to the 'common sense' of the statute . . . , to its purpose, [and] to the practical consequences of the suggested interpretations . . . for what light each inquiry might shed." *New York State Commission on Cable Television* v. *FCC*, 571 F.2d 95, 98 (2d Cir.), *cert. denied*, 439 U.S. 820 (1978).

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[5] The Register of Copyrights filed a brief *amicus curiae* limited to an argument that EMI's retransmission service constitutes a "public performance" of the audiovisual works retransmitted. In view of our disposition, we need not and do not decide that question in this case.

EMI's activities, described as those of an intermediate or "resale" transmitter, are a new and mixed breed. Unlike those of broadcasters and CATV systems, they do not include the sending of signals intended for reception as such on television sets.[6] Like those on some CATV systems, they do include the acquisition "off the air" of broadcast signals. Unlike the activities of older, established common carriers, e.g., the telephone company, they include carrying the communications desired by receivers rather than those desired by senders. Also unlike older common carriers, EMI is paid by receivers rather than by senders. Like those of older common carriers, EMI's activities are paid for as services and involve transmittal of the entire signal without change.

A television broadcast station sends out "on-the-air" signals at frequencies within the broadcast band. Television sets positioned to receive those signals convert them into an audible and visible, i.e. "audiovisual", display. In rendering a retransmission service, the first step is reception of the same "off-the-air" television signals of a broadcast station. The next step of the retransmitter, however, is not conversion into an audiovisual display, but conversion to a frequency within the microwave band. The third step is transportation of the microwave signal. As above indicated, EMI's microwave signal is transported in one of two ways: (1) through a string of line-of-sight terrestrial repeater stations; or (2) directly to a receiver

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[6] EMI transmissions along its string of microwave repeaters are not so receivable. Though not so intended, its satellite transmissions can be received by a growing number of "dishes" and associated equipment purchased by individual homeowners and others. Unauthorized interception of private communications has been held subject to criminal and civil liability. *See National Subscription Television* v. *S & H TV*, 644 F.2d 820 (9th Cir. 1981); *American Television and Communications Corp.* v. *Western Techtronics, Inc.*, 529 F.Supp. 617 (D.Colo. 1982) (microwave transmissions); *Home Box Office, Inc.* v. *Advanced Consumer Technology*, No. 81-Civ. 559 (MDS) (S.D.N.Y. Nov. 4, 1981) (same); *Home Box Office, Inc.* v. *Pay TV of Greater New York, Inc.*, 467 F.Supp. 525 (E.D.N.Y. 1979). See also FCC, *Public Notice, Unauthorized Interception and Use of Multipoint Distribution Service Transmissions*, No. 11850 (January 24, 1979).

dish at the RCA American Communications, Inc. (RCA) earth station uplink site, where it is converted to another microwave frequency, transmitted to an RCA satellite transponder leased by EMI, and relayed by the transponder back to earth. Whichever transporting method is used, the last retransmission step is delivery of the microwave signals to headends of CATV systems, EMI's customers. Distribution of the signals received at a headend, to subscribers for display on their television sets, is a step performed entirely by the CATV system and forms no part of the activities or services of EMI. The retransmission services provided by EMI are thus an intermediate link in an overall chain of distribution of television broadcast signals, a link making broadcast signals originally available in one are available in microwave form at the headends of CATV distribution systems positioned in other areas.

The present activity of EMI cannot be viewed in historical isolation. In 1968, the FCC suspended the hearing process required by its 1966 rules in favor of proposed rules requiring cable systems in the top 100 markets to obtain consent from distant stations before transmitting their signals. *Notice in Docket No. 18397,* 15 F.C.C. 2d 417 (1968). That resulted in denial of virtually all transmission rights, and designation of the action as a "freeze" on cable growth.

At about the same time as the 1968 FCC action, distribution of microwave-relayed television signals by CATV systems to subscribers was held not a "performance" under the Copyright Act of 1909, and CATV systems were therefore not liable for copyright infringement. *Fortnightly Corp.* v. *United Artists Television, Inc.,* 392 U.S. 390, 88 S. Ct. 2084, *reh. denied,* 393 U.S. 902, 89 S. Ct. 65 (1968); *Teleprompter Corp.* v. *Columbia Broadcasting Sys., Inc.,* 415 U.S. 394, 94 S. Ct. 1129 (1974).

Congress over the ensuing years worked out a legislative compromise, one part of which was the provision in the Act of a definition of "to perform or display a work publicly" having a breadth sufficient to encompass the distribution of relayed signals by CATV systems. Recognizing that a process requiring each CATV system to obtain the consent of or negotiate with

numerous individual copyright owners would be unworkable, *See, Malrite T.V. of New York,* v. *Federal Communications Commission,* 652 F.2d 1140, 1148 (2d Cir. 1981), *cert. denied, sub nom, National Football League* v. *Federal Communications Commission,* 102 S. Ct. 1002 (1982), Congress established as the other part of the compromise the compulsory license program set forth in the Act.[7]

Under the congressionally mandated scheme, television broadcast stations like WOR-TV continue to pay license or royalty fees directly to copyright owners like Doubleday, while CATV systems pay license fees under their compulsory licenses to the United States Copyright Office in accord with formulae provided in 17 U.S.C. § 111(d)(2)(B).[8] The fees paid by

[7] 17 U.S.C. § 111(c)(1) provides:

Subject to the provisions of clauses (2), (3) and (4) of this subsection, secondary transmissions to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work shall be subject to compulsory licensing upon compliance with the requirements of subsection (d) where the carriage of the signals comprising the secondary transmissions is permissible under the rules, regulations, or authorizations of the Federal Communications Commission.

[8] 17 U.S.C. §111(d)(2)(B) provides in part:

(B) except in the case of a cable system whose royalty is specified in subclause (C) or (D), a total royalty fee for the period covered by the statement, computed on the basis of specified percentages of the gross receipts from subscribers to the cable service during said period from the basic service of providing secondary transmissions of primary broadcast transmitters, as follows:

> (i) 0.675 of 1 per centum of such gross receipts for the privilege of further transmitting any nonnetwork programming of a primary transmitter . . .
>
> (ii) 0.675 of 1 per centum of such gross receipts for the first distant signal equivalent;
>
> (iii) 0.425 of 1 per centum of such gross receipts for each of the second, third, and fourth distant signal equivalents;
>
> (iv) 0.2 of 1 per centum of such gross receipts for the fifth distant signal equivalent and each additional distant signal equivalent thereafter; . . .

CATV systems are distributed to copyright owners like Doubleday by the Copyright Royalty Tribunal (Tribunal), as provided for in 17 U.S.C. § 111(d)(5).[9] The Congressional scheme thus provided for compensation from CATV systems to copyright owners measured by the number of cable viewers or potential viewers, and placed the responsibility for payment of that compensation on the CATV systems.

Exemption

We begin, as we must, with the statute, 17 U.S.C. § 111(a)(3), supra, note 3, under which EMI is entitled to the "carrier"[10] exemption if its activities are passive, merely retransmitting exactly what it receives, if it exercises no control over the content or selection of the primary transmission, or over the particular recipients of its transmission, and if its retransmission activities consist solely of providing wires, cables, or other communications channels for the use of others.[11]

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[9] 17 U.S.C. § 111(d)(5) reads:

(5) The royalty fees thus deposited shall be distributed in accordance with the following procedures:

(A) During the month of July in each year, every person claiming to be entitled to compulsory license fees for secondary transmission shall file a claim with the Copyright Royalty Tribunal, in accordance with requirements that the Tribunal shall prescribe by regulation.

[10] Though Doubleday insists on comparing EMI with the telephone company, the statute speaks in terms of "any carrier", 17 U.S.C. § 111(a)(3), supra note 3, and EMI is licensed by the FCC as a common carrier, infra, note 14.

[11] As reflected in the text, we believe a proper application of the statute, and continuation of its overall scheme as designed by Congress, requires that EMI's activities challenged in this case be perceived as falling within the intent of 17 U.S.C. § 111(a)(3). Later pronouncements of the Congress cannot be looked to as indicative of its intent at the time of a statute's

(Footnote continued on following page)

The first question presented is thus whether EMI exercised "control over selection of the primary transmission" when it chose to retransmit the WOR-TV signal via satellite. Via its terrestrial microwave repeaters, EMI retransmits the broadcast signals of WOR-TV, WNEW, WPIX, WCBS-TV, WSBK, WSTM, WPHL, WIXT, WUAB, CHCH, CKWS, WQXR-FM, Home Box Office, Prism, and programming of the Pennsylvania Educational Television Network. With respect to its extra-terrestrial activity, only one satellite transponder was made available to EMI, enabling satellite retransmission of only one broadcaster's signals.

With satellite transmission of but one broadcaster's signals available, EMI naturally sought to retransmit those of a

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enactment. Of general interest, however, is a recent House Committee Report on H.R. 5949, 97th Cong., 2nd Sess. (May 17, 1982), and its comment on this very case:

> In the course of Committee deliberations on this legislation, a decision was issued in a case involving an interpretation of Section 111(a)(3), *Eastern Microwave, Inc.* v. *Doubleday Sports, Inc.*, 81-CV-303 (N.D., N.Y., March 12, 1982), which leaves the cable industry in a state of turmoil. The holding of that case was that the carrier, Eastern Microwave, Inc., failed to qualify for the Section 111(a)(3) exemption. In the Committee's view, the decision incorrectly construed the carrier exemption. If the decision is applied to other parties, all satellite resale carriers could be held liable for copyright infringement when they deliver distant signals to cable systems. Further, terrestrial microwave carriers could also be in danger of losing their exemption. These carriers are the primary means whereby cable systems receive distant signals for retransmission to cable subscribers; rather than face copyright liability, they may suspend broadcast retransmission. As a result, the signal carriage standards of the FCC could be undone, and the entire compulsory licensing scheme undercut, which would be antiethical [sic] to the intent of this committee and the public interest.
>
> There has never been any doubt by this Committee that carriers are exempt from copyright liability when retransmitting television signals to cable systems via terrestrial microwave or satellite facilities. H.R. REP. No. 559, 97th Cong., 2d Sess. 4 (1982).

marketable station. If EMI's CATV satellite customers had preferred the signals of WNEW, for example, over those of WOR-TV, EMI would presumably have chosen the former over the latter. Based on demand shown by numerous CATV systems surveyed and solicited, the marketable station sought proved to be WOR-TV. In meeting that demand by supplying the WOR-TV signal, EMI does so passively, retransmitting exactly what it receives and the entirety of what it receives. That one-time determination by EMI to retransmit WOR-TV's signals reflects EMI's limitation to one technical facility and the realization that once contracts are entered, EMI cannot retransmit any other signals on that facility.

Technical restrictions which forced EMI to make an initial, one-time determination to retransmit the signals of a particular station, whatever the content of those signals, do not evidence the "control over the content and selection of the primary transmission" intended to be precluded under Section 111(a)(3). In the ordinary common carrier context, the carrier must render its service to all comers, denying it to none on the basis of content, and must not select or choose among those who seek to use its service, on any basis other than a legitimate business reason. When the communication service is technologically limited to one sender, however, a type of "selection" is impelled. That type of forced selection cannot be the type precluded by the statute in the context here presented, for to so hold would be to require that exemption be denied to any carrier that did not retransmit every television broadcast of every television station in the country. Moreover, if station selection were the type of "selection" precluded, a failure to retransmit the signals of one station could be viewed as a control of content forbidden to carriers by the Act.[12] To hold

[12] Moreover, the futility of embuing technological limitations with copyright significance is illustrated by a consideration that if selection of one station when only one is technically possible precludes exemption, a selection of two, or three, or thirteen, or whatever number (less than the total) was technologically possible, would also preclude exemption.

that "selection" means station selection would thus emasculate the exemption provision of the Act with respect to intermediate carriers, in derogation of the duty of upholding statutory provisions not contrary to reason, logic, common sense or the Constitution.

To remain exempt, a carrier-retransmitter must avoid content control by retransmitting exactly what and all of what it receives, as EMI does here. To do otherwise could be perceived as the carrier's making the transmission its own. That EMI serves customers at one end of the communications chain, and telephone companies serve customers at the other, is not controlling, so long as neither injects its own communications into that chain. If WOR-TV had requested and paid EMI to transmit its broadcast signal, for example, the traditional common carrier context would have been created. That EMI serves numerous receiving CATV systems, with the one available set of signals those customers prefer, rather than serving numerous sending broadcasters, is a difference insufficient to deny EMI the statutory carrier exemption on the ground that it is controlling the content or selection of that set of signals.

The second requirement, an absence of direct or indirect control over the particular recipients of its retransmission, is fully satisfied by EMI. It is undisputed that the "particular recipients"[13] of EMI's retransmissions are the many CATV systems which it serves under contract. That it renders its service to certain CATV systems and not others does not itself constitute, however, any control, direct or indirect, over particular recipients. As above indicated, the so-called "resale carriers" are somewhat new in the common carrier world, in that they serve the receiver rather than the sender of a commu-

[13] Because Congress was focusing on CATV systems which had been themselves acquiring broadcast signals and making a "secondary transmission" thereof to their subscribers, it may arguably have intended that "particular recipients" be read as the viewers-subscribers of the CATV system. If so, EMI's activities are even more divorced from control of those recipients.

nication. EMI is subject to FCC regulation and has been granted authority under 47 U.S.C. § 214 to operate as a common carrier.[14] As such, it is bound to furnish its communications services upon reasonable requests. 47 U.S.C. § 201(a). That EMI operates under FCC-approved tariffs which a particular CATV system might not be able to meet does not mean that EMI exercises control over its recipient CATV customers. The record indicates that no reasonable request for its services was ever refused by EMI. EMI has thus not exercised "control over the particular recipients" of its transmissions within the meaning and intent of 17 U.S.C. § 111(a)(3).

EMI also meets the third requirement, that it merely provide wires, cables, or other communications channels for the use of others. As above indicated, the "others" here are the receiving CATV systems which cannot afford their own wires, cables, and channels, rather than the originating senders who use (and cannot afford their own) wires, cables, and channels of more traditional common carriers like a telephone company. EMI provides the wires and cables of its repeater stations for use of its CATV customers in acquiring the signals of WOR-TV and those of many other originators. It provides its single satellite transponder for use of its CATV customers in acquiring the signals of necessarily one originator, i.e., WOR-TV.

Doubleday argues in effect that EMI provides wires, etc., for its own use because it is "selling" the Mets games.[15] EMI is selling, however, only its transmission services, CATV systems paying therefore on the basis of number of subscribers only up

[14] EMI has been licensed by the FCC to provide point-to-multipoint distribution of the WOR-TV signal via its terrestrial relay facilities and the transponder leased from RCA. *In re Applications of Eastern Microwave, Inc.*, 70 F.C.C.2d 2195 (1979).

[15] Doubleday complains bitterly of EMI's promotional and marketing efforts. Engaging in those normal business activities does not, however, constitute doing "more than" providing wires, etc. Compliance with the third requirement is met if a carrier does no more than provide wires, etc., "with respect to the secondary transmission." 17 U.S.C. § 111(a)(3).

to a maximum compensation of $3,000, regardless of the content of the retransmitted signals. When the maximum is reached, the payment remains the same, regardless of the number of subscribers. EMI transmits nothing of its own creation. It transmits only to the headends of its customers who employ its services in lieu of obtaining their own wires, cables, etc., infra, note 17. That it transmits particular signals in response to contracts with its customers specifying those signals, and that it announces to potential customers its ability to transmit those signals, are actions not in conflict with an exempt carrier status. EMI's activities with respect to its transmissions thus consist of nothing more than providing wires, cables, and other communication channels for use of others within the meaning and intent of 17 U.S.C. § 111(a)(3).[16]

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[16] Our attention has been invited to *WGN Continental Broadcasting Company and Albuquerque Cable Television, Inc.* v. *United Video, Inc.*, No. 81-2687 (7th Cir. Aug. 11, 1982). There, United Video retransmitted WGN's signal to cable systems, a service similar to EMI's. Unlike EMI's, however, United Video actively removed material inserted by WGN into the "vertical blanking interval" and substituted business news. *Id.* at 2.

In *WGN*, the court recognized, as do we, that passive intermediaries like EMI are entitled to the exemption:

> The exemption thus allows carriers such as United Video to act as purely passive intermediaries between broadcasters and the cable systems that carry the broadcast signals into the home, without incurring any copyright liability. The cable system selects the signals it wants to retransmit, pays the copyright owners for the right to retransmit their programs, and pays the intermediate carrier a fee for getting the signal from the broadcast station to the cable system. The intermediate carrier pays the copyright owners nothing provided it really is passive, like a telephone company. *Id.* at 3.

Because United Video was not passive, it was held non-exempt. As indicated, supra, note 5, we do not here discuss the question of whether an intermediate resale transmitter publicly displays or performs when it transmits. Similarly, we do not comment on the remarks touching that question in *WGN* or on the effect, if any, on that question of United Video's injecting its "own" programming. There is an indication, in *WGN* and in the briefs here,

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The Compulsory License Scheme

Interpretation of the Act must occur in the real world of telecommunications, not in a vacuum. The centerpiece of the compromise reflected in the Act is the compulsory licensing scheme. That scheme is predicated on and presupposes a continuing ability of CATV systems to receive signals for distribution to their subscribers. Doubleday is but one of numerous copyright owners whose works may be broadcast by WOR-TV. EMI serves as a signals conduit between the performance by WOR-TV and the performance by its CATV system customers. Adoption of Doubleday's position would stand all copyright owners athwart that conduit between the original broadcast and the opportunity for subsequent performances by CATV systems. In so doing, it would defeat Congress' intent by imposing on EMI the unworkable separate negotiations with numerous copyright holders from which the Act sought to free CATV systems.

Congress drew a careful balance between the rights of copyright owners and those of CATV systems, providing for payments to the former and a compulsory licensing program to

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that an interpretation limiting "public performance" to transmissions capable of reception by the public would necessarily render the "carrier" exemption superfluous. When the 1965 version of the bill eliminated "common carrier," the late Professor Derenberg wrote the House Judiciary Committee, fearing that a CATV system that leased AT&T equipment to distribute signals directly to the public would render AT&T liable for infringement. The exemption was reinstated. Thus common carriers whose equipment is used to distribute signals to CATV subscribers have a continuing need for the exemption to avoid liability for communicating "to the public" as expressed in the pertinent portion of 17 U.S.C. § 101:

> (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

insure that the latter could continue bringing a diversity of broadcasted signals to their subscribers. The public interest thus lies in a continuing supply of varied programming to viewers. Because CATV systems served by intermediate carriers cannot provide their full current programming to their subscribers without the services of those carriers,[17] imposition of individual copyright owner negotiations on intermediate carriers would strangle CATV systems by choking off their life line to their supply of programs, would effectively restore the "freeze" on cable growth described above, and, most importantly, would frustrate the congressional intent reflected in the Act by denying CATV systems the opportunity to participate in the compulsory licensing program. After years of consideration and debate, Congress could not have intended that its work be so easily undone by the interposition of copyright owners to block exercise of the licensing program by cable systems.[18]

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[17] EMI retransmits WOR-TV's signals to six hundred CATV systems which cannot provide retransmission for themselves because satellite transponders are unavailable and because the capital costs of repeater stations are prohibitive.

[18] It is asserted that various groups are at best disenchanted with the compulsory license scheme. If so, their remedy lies with the Congress, not the courts. *See* Remarks of Bowie Kuhn, Commissioner of Baseball, June 2, 1982: "We have always taken the position that the compulsory license should be repealed and replaced by a marketplace solution. We continue to believe strongly that complete repeal of the compulsory license is the proper course." Hearings Before the Subcommittee of Telecommunications, Consumer Protection and Finance of the House Committee on Energy and Commerce, 97th Cong., 2d Sess. 46-47 (1982). *See also* Speech by Mark S. Fowler, FCC Chairman, to Association of Independent Television Stations Inc. (Jan. 26, 1982); Hearings before the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 124-25 (1981) (Testimony of David Ladd); Letter of Asst. Atty. Gen. Robert A. McConnell, Justice Dept. Office of Legislative Affairs, to Chairman Rodino, House Judiciary Comm. (Mar. 20, 1982); U. S. Dept of Commerce, National Telecommunications and Information Admin., *Cable Copyright, Alternatives to the Compulsory License* (Dec. 1981); Hearings Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the House Judiciary Comm., 97th Cong., 1st Sess. 51 (Prepared Statement of Clarence James, former Chairman of the Copyright Royalty Tribunal at 67) (Mar. 4, 1981).

The Royalty Scheme

EMI is, like all common carriers, compensated for its transmission services as such. In accord with its FCC-approved tariff, and as above indicated, EMI is paid by each CATV system in relation to the number of its subscribers up to a maximum of $3,000. The fee does not increase thereafter, regardless of the number of a CATV system's subscribers. In contrast, the royalty fee paid by each CATV system under the Act is limited to no maximum, but is entirely based on percentages of gross receipts from subscribers to the CATV service in accord with 17 U. S. C. § 111, supra, note 8.

It is undisputed that if each CATV system had its own string of microwave repeaters or satellite transponder it would be liable through the Tribunal to a copyright owner for only the one established royalty fee when and if it publicly performed the copyrighted work by making it available to its subscribers; and that such an integrated CATV system would not be liable for a second royalty fee for having itself retransmitted the original broadcast signal to its headend. We are unpersuaded by counsel's urging that a different result should obtain when a separate entity, e.g. EMI, supplies the retransmission service. That EMI is a separate entity supplies no justification for subjecting EMI to copyright liability when those same activities would not result in copyright liability if carried out by the CATV systems served by EMI. In the Act, Congress established a specific scheme for recognition of the rights of copyright owners. Under that scheme those rights are not unlimited. Neither are they rendered superior to the rights of viewers. If this court were to impose here a requirement that intermediate carriers negotiate with and pay all copyright owners for the right to retransmit their works, assuming such requirement were not impossible to meet, such action would produce a result never intended by Congress, namely a substantially increased royalty payment to copyright owners with no increase in number of viewers.[19]

[19] EMI asserts that a royalty payment to Doubleday alone would amount to millions. Moreover, under the district court's rationale for denying

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Conclusion

In summary, given the nature of EMI's services here involved, and the role those services play in the overall chain of signals distribution, we conclude that EMI is not in law infringing Doubleday's exclusive right to display its copyrighted work by passively retransmitting the entirety of WOR-TV's broadcast signal to the headends of its customer CATV systems, because those services are such as to fall within the exemption provided for in 17 U.S.C. § 111(a)(3). Reversal of the judgment appealed from is accordingly required.

REVERSED

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exemption, RCA's retention of its transponder and retransmittal of the WOR-TV signal received from EMI, would require payment of four royalties to Doubleday and all other owners of copyrighted works broadcast by WOR-TV (one each from WOR-TV, EMI, RCA and the CATV systems) though the number of ultimate viewers would remain unchanged from the present number justifying payment of two royalties.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

81-CV-303

EASTERN MICROWAVE, INC.,
Plaintiff,

-v-

DOUBLEDAY SPORTS, INC.,
Defendant.

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Memorandum-Decision and Order

This matter is before the Court on the parties' cross motions for partial summary judgment. The issues to be decided are: (1) whether Eastern Microwave's retransmissions of WOR-TV telecasts, more particularly WOR's broadcasts of the METS' games, are public performances within the meaning of 17 U.S.C. § 106; and (2) whether Eastern Microwave is exempt from copyright liability for those retransmissions, if they are found to be public performances, by virtue of the exception set out in 17 U.S.C. § 111(a)(3). For the reasons set forth below, plaintiff's motion for partial summary judgment is denied; defendant's motion for partial summary judgment is granted.

Background

Plaintiff Eastern Microwave, Inc. [EMI], a Syracuse based corporation, is licensed by the Federal Communications Committee [FCC] to act as a communications common carrier. *See* 47 U.S.C. § 214.[1] At least part of the business conducted by EMI is the retransmission of television signals via microwave and satellite transmission to Community Antennae Television [CATV], or cable systems in the Northeast and across the country. EMI retransmits approximately 16 different television signals. The controversy in this case centers on the retransmission of one of those signals, WOR-TV, broadcast from New York City.

Plaintiff has been retransmitting the WOR signal, either by microwave relay or by satellite, or both, since 1965. To this date, WOR has not objected to EMI's transmission of its signal.

[1] The definition of common carrier is set forth in 47 U.S.C. § 153 as follows: " 'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communications by wire or radio. . . ."

One of the copyright owners of a program broadcast by EMI has, however, objected to the retransmission of its copyrighted work, the defendant Doubleday Sports, Inc.[2]

Defendant Doubleday is the owner of the New York Mets, a National League baseball team. Each year Doubleday contracts with EMI for the broadcast of approximately 100 Mets' games per season.[3] At the beginning and conclusion of each game broadcast, the following disclaimer is read by the broadcaster:

> This copyrighted telecast is authorized under television rights granted by the New York Mets solely for the entertainment of our audience. Any publication, reproduction or use of the pictures, descriptions and accounts of this game without the express written consent of the New York Mets is prohibited. Any commercial or other use of the program, such as by charging admission for its showing, is similarly prohibited.[4]

EMI has never requested, nor has Doubleday ever granted to EMI, permission to retransmit the Mets' games to its CATV customers. It is this retransmission without consent that Doubleday alleges infringes its rights under the Copyright Act, 17 U.S.C. §§ 101-702.

Doubleday first informed EMI of its objection to EMI's retransmission of the Mets' games on March 27, 1981. By letter, Doubleday gave notice to EMI that Doubleday viewed any retransmission by EMI of the Mets' games scheduled for

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[2] EMI argues that, under common law notions, Doubleday may not be the owner of the copyright in the games broadcast by WOR-TV. The Court need not decide this issue, however, as there exists a contract between WOR-TV and Doubleday reserving the copyright interest in the games broadcast to Doubleday Sports, Inc.

[3] Doubleday has contracted with other entities to broadcast METS' games, other than those telecast by WOR.

[4] This disclaimer is read in the past tense at the conclusion of the game.

broadcast in the month of April to be an infringement of Doubleday's copyright interest in those broadcasts.[5] Doubleday also sent a telegram to EMI restating the same message. The following month, Doubleday once again sent a letter and confirming telegram stating its objection to any retransmission by EMI of the Mets' games. This letter and telegram set forth the games to be telecast by WOR-TV in the month of May. EMI, however, continues to retransmit the WOR-TV signal without deleting the Mets' games. On April 3, 1981, EMI filed suit in this Court seeking a judicial declaration that its retransmissions of the Mets' games do not infringe on any copyright interest held by defendant. Doubleday subsequently brought this motion for partial summary judgment declaring, pursuant to Rules 56 and 57 of the Fed. R. Civ. P., plaintiff's retransmissions not exempt from infringement by virtue of the exceptions to the Copyright Act contained in § 111(a)(3) and dismissing plaintiff's complaint for declaratory judgment in accordance therewith. EMI thereafter crossed moved for partial summary judgment seeking denial of plaintiff's motion and affirmative judgment for defendant.

EMI orginally alleged that it was exempt from copyright liability because its retransmissions were within the exception set out in 17 U.S.C. 111(a)(3) for carriers. EMI later amended its complaint to set forth its further contention that it was not liable for copyright infringement because it does not perform the retransmissions publicly, as required by 17 U.S.C. § 106. It is the opinion of the Court that neither of these arguments is availing.

Discussion

Public Performance

Pursuant to the Copyright Act, the owner of a copyrighted work has the exclusive right to perform that work publicly. 17

[5] There is no dispute in this case that these games, if "fixed" i.e., recorded simultaneously, are copyrightable.

U.S.C. § 106. Therefore, in order for this Court to find that EMI is infringing Doubleday's copyright in the Mets' games broadcast over WOR-TV, it must first be determined that EMI's retransmission of the games to its CATV customers constitutes a public performance.

The definition of a public performance is set forth in 17 U.S.C. § 101, which states in pertinent part:

> To perform or display a work "publicly" means—
>
> (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
>
> (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

Here, the parties do not dispute the EMI "performs" the WOR broadcasts of the Mets' games;[6] the question is whether it does so publicly.

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[6] EMI retransmits the WOR signal by two methods, microwave point to point relay and by satellite.

As described in plaintiff's memorandum of law, a microwave relay system consists of a series of terrestrial microwave radio stations using towers or other high structures. The structures are located on high mountain peaks or other unobstructed sites which permit line-of-sight interference-free signal transmission to each other, on frequencies allocated and licensed by the F.C.C. Using a string of microwave stations, television signals, once converted to microwave signals, are relayed over long distances. Ultimately, the microwave signal is transmitted to the CATV receiving antenna or headend, where it is fed into electronic signal processing equipment by the CATV operator. The Frequency is then reconverted to a television frequency and delivered to the CATV subscribers. Pl. Mem. at 7.

(Footnote continued on following page)

The recipients of EMI's retransmissions of the WOR telecasts are approximately 600 CATV systems across the country, and two hotels located in Las Vegas, Nevada.[7] As described in more detail in n. 6, the CATV systems receive the EMI retransmission at a headend, or receiving antenna. The headends are not places open to the public. These retransmissions, therefore, are not to the public within the meaning set forth in clause one of section 101. It appears to this Court, however, that these retransmissions are public within the meaning of clause two of that section, that is, EMI "transmit[s] or otherwise communicate[s] a performance ... *to the public*...." 17 U.S.C. § 101 (emphasis added).

It is EMI's position that "public" as used in this portion of section 101 refers solely to members of the viewing public. Therefore, it contends that its transmissions to CATV systems are not transmission to the public because the CATV systems do not view the programs transmitted, they merely alter the signal received and transmit it to their subscribing members. It is the subscribing members that EMI asks this Court to view as

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(Footnote continued from preceding page)

Satellite retransmission allows the carrier to carry the transmission to farther distances more economically. Again, as described by plaintiff in its memorandum, EMI transmits the WOR signal via satellite by first picking up the WOR signal "off the air" at its antenna in Highland Lakes New Jersey. EMI then transmits the signal to the satellite's earth station transmitting site in Vernon Valley, New Jersey. Here, the signal of WOR is transmitted to the satellite by use of an "up-link" or ten meter parabolic dish. The signal is then relayed to Earth and is collected at an earth receive station, or "down-link", owned by EMI's CATV customers. The CATV operator then reconverts and delivers the signal in the same manner as when the signal is relayed by microwave. Pl. Mem. at 9-10.

[7] The parties, in their arguments to the Court have, interestingly enough, not focused on the differences between a CATV system and the hotels, as relates to the public performance requirement and the availability of the exception in § 111(a)(3). However, because it is the opinion of this Court that EMI's retransmissions to the CATV systems are not excepted from liability under § 111(a)(3) and that these are public performances, the rationale of this opinion, although not directed to the hotels, is intended to include the transmissions to the hotels.

the "public", thereby making EMI's transmissions non-public performances. This Court does not agree.

There is no evidence that in drafting this definition, Congress intended the word "public" to be construed so narrowly. *See, e.g.*, H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 64-65, *reprinted in* [1976] U.S. Code Cong. & Ad. News, 5659, 5679-5680.[8] Had Congress intended the "public" to be limited to members of the viewing public, it could easily have limited the definition. Such is not the case. In the absence of such intention on the part of Congress, this Court is not willing to narrow this definition. EMI's CATV customers are themselves members of the public.[9] The retransmissions of the MET's games by EMI are, therefore, public performances.

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[8] In commenting upon this exception, the Senate Committee stated in its report that:

> Clause (2) of the definition of "publicly" in section 101 makes clear that the concepts of public performance and public display include not only performances and displays that occur initially in a public place, but also acts that transmit or otherwise communicate a performance or display of the work to the public by means of any device or process. The definition of "transmit"—to communicate a performance or display "by any device or process whereby images or sound are received beyond the place from which they are sent"—is broad enough to include all conceivable forms and combinations of wired or wireless communications media, including but by no means limited to radio and television broadcasting as we know them. Each and every method by which the images or sounds comprising a performance or display are picked up and conveyed is a "transmission," and if the transmission reaches the public in any form, the case comes within the scope of clauses (4) or (5) of section 106.

H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 64-65, *reprinted in* [1976] U.S. Code Cong. & Ad. News, 5659, 5679-5680.

[9] It is not disputed that the CATV systems are customers of EMI. EMI's Domestic Resale Satellite Communications Services Tariff, F.C.C. No. 11 at page 6 states that "Customer is *any member of the public* who directly orders or orders and receives communications services offered or provided by Carrier [EMI]." (Emphasis added). Further, EMI's CATV Service Agreement states that "WHEREAS EASTERN MICROWAVE, INC. is a common carrier licensed by the Federal Communications Commission to engage in *furnishing to the public*, video and audio program transmission service. . . ." (Emphasis added).

The parties have cited, and the Court has found, only one published opinion involving the meaning of "public" within 17 U.S.C. §§ 106, 101 *WGN Continental Broadcasting Co.* v. *United Video, Inc.*, 523 F. Supp. 403 (N.D. Ill.) (appeal docketed Oct. 26, 1981, 81-2687). In that case, Judge Getzendanner held that satellite retransmissions to CATV system "headends" were not performances to the public within the meaning of 17 U.S.C. §§ 101, 106. There the Court stated that:

> [i]t is true that without UVI [the carrier] these cable systems would not be able to transmit WGN's programming to the public, but UVI is only an intermediary in the distribution chain. The retail distributors, the cable television systems, pay royalties because they distribute to the public. If the wholesaler, UVI, was also liable for copyright infringement, it would also be liable for royalties. That would result in a double payment but the number of ultimate viewers would remain the same.

Id. at 415. The Court further stated that an interpretation of the term "public" which would include the CATV systems, would, in effect, read the public requirement out of the Act. *Id.* This Court does not agree. Rather, to limit the meaning of public to the viewing public without express direction from Congress would be to read a narrow interpretation of public *into* the Act. Therefore, it is the determination of this Court that EMI does publicly perform the copyrighted works of Doubleday Sports, within the meaning of 17 U.S.C. §§ 101, 106.

Exception

Not all public performances of copyrighted works constitute copyright infringement. The Act contains certain limitations on the exclusive right to public performance. The

limitation relevant here is found in 17 U.S.C. § 111(a)(3), which provides that:

> [t]he secondary transmission of a primary transmission embodying a performance or display of a work is not an infringement of a copyright if—
>
> (3) The secondary transmission is made by any carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cable, or other communications channels for the use of others. . . .

Id.[10] In this case, the primary transmission is the signal broadcast by WOR-TV; the secondary transmission is the retransmission of the WOR signal by EMI to its CATV customers. EMI argues that it has no control over the content or selection of the primary transmission or over the recipients of the secondary transmission and that its activity is limited to providing wires, etc. Doubleday contends that EMI does not

[10] Primary and Secondary transmissions are defined in 17 U.S.C. § 111(f) as follows:

> A "primary transmission" is a transmission made to the public by the transmitting facility whose signals are being received and further transmitted by the secondary transmission service, regardless of where or when the performance or display was first transmitted.
>
> A "secondary transmission" is the further transmitting of a primary transmission simultaneously with the primary transmission, or nonsimultaneously with the primary transmission if by a "cable system" not located in whole or in part within the boundary of the forty-eight contiguous States, Hawaii, or Puerto Rico: Provided, however, That a nonsimultaneous further transmission by a cable system located in Hawaii of a primary transmission shall be deemed to be a secondary transmission if the carriage of the television broadcast signal comprising such further transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission.

come under this exception. This Court finds the position of Doubleday more convincing.

The first requirement for this exception to be effective is that the carrier have no control over the content or selection of the primary transmission, in this case the signal of WOR-TV. Based on the record before the Court, it appears that EMI does not exercise control over the content of WOR-TV programming. It does, however, exercise control over the selection of the primary transmission.

It was EMI that selected WOR's signal to be retransmitted to the public. The decision to retransmit WOR by satellite relay was made after EMI had conducted a survey to determine the marketability of the WOR signal. Originally, EMI had planned to transmit two television signals via satellite, WOR and WSBK, broadcast from Boston. EMI was only able to contract for one channel over the satellite, therefore, it had to select between the two already selected for the one signal to be retransmitted. Based on the demand for WOR-TV demonstrated by EMI's survey, EMI selected the WOR signal. It is clear that EMI selected the primary transmission.

EMI argues that this Court should hold that no selection has been made by EMI because the sole reason EMI selected WOR's signal is EMI's inability to retransmit every television signal broadcast in the country. EMI urges that the technical impossibility of transmitting every tv signal forced EMI to choose one signal. Therefore, it was necessity, or technical impossibility, that selected the WOR signal. This Court finds this argument to be without merit.

EMI also exercises control over the recipients of the secondary transmission, the CATV systems. It is EMI who chooses the customers with which it will deal. EMI contends that the subscribing members of the CATV systems, the viewing public, are the recipients of the secondary transmission

and that EMI has no control over these recipients.[11] EMI only carries the secondary transmission to the CATV headends, however. The signal received by the subscribing members is transmitted by the CATV systems themselves. Therefore, the recipients of the secondary transmission carried by EMI are the CATV systems, not their subscribing members.[12]

Assuming, arguendo, that EMI did not exercise control over the selection of the primary transmission or the recipients of that transmission, this exception would still not be available to EMI for its activity is not limited to providing wires, cables, or other communications channels, for the use of others, as required by section 111(a)(3).[13]

It is true that EMI makes its service available by providing these avenues of communication. It does not, however, provide them solely for the use of others. Rather, they are used to make available the product it is marketing, WOR-TV.

In its brief, EMI likens itself to carriers such as AT&T, who do provide wires, etc., for the use of others. EMI contends that as the activities of AT&T would, in many cases, come under the exception contained in section 111(a)(3), so should this activity of EMI.[14] In connection with this contention, EMI has filed

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[11] It appears from at least one of the documents filed in this case that EMI might control some of the recipients of the signal as delivered by the CATV systems. EMI's Customer Service Order provides that "The cable system will not have the right to extend the service to other customers without Eastern's permission. Eastern shall grant such permission at tariff rates."

[12] As described, *supra* at n. 6, the signal received by the subscribing members is not the same signal retransmitted by EMI. The CATV operator must reconvert EMI's signal into a frequency which can be received by the subscribing member.

[13] H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 92, *reprinted in* [1976] U.S. Code Cong. & Ad. News, 5706, states that for this exception to be available, the carrier must be "passive".

[14] It would appear from the ⅛⅜!
was impliedly, if not specificly, designed to provide exemption to carriers such as AT&T. Pl. Mem. at 40-50; Def. Memo. at 45-55.

with the Court numerous examples of AT&T advertising campaigns, the similarity of which to EMI advertisements it urges places EMI in *pari causa* with AT&T. There is, however, at least one major difference between AT&T and EMI. AT&T markets its services; EMI markets a product.

The advertisements demonstrate that EMI is doing more than providing cables, etc., for the use of others. It is selling a product, the signal of WOR-TV. While AT&T makes its services available to anyone desiring to transmit a communication from one point to another, EMI only offers the communication it is marketing. EMI, therefore, is using the facilities it makes available for its own marketing, not for use by others. It is not the fact that EMI advertises that causes EMI to lose the exemption set forth in this section. It is the fact that the advertisements demonstrate that EMI is, itself, using the wires, etc., it makes available, in contravention of the requirement set forth in 17 U.S.C. § 111(a)(3).

The Court having determined that EMI performs the copyrighted works of the defendant publicly, and that the exemption contained in 17 U.S.C. § 111(a)(3) is not available to EMI, it is hereby

ORDERED, ADJUDGED AND DECREED that plaintiff's motion for partial summary judgment declaring plaintiff's transmissions exempt from infringement is denied and defendant's motion for partial summary judgment dismissing the complaint is granted.

IT IS SO ORDERED.

Neal P. McCurn
U. S. District Judge

DATED: March 12, 1982
Syracuse, New York

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

81-CV-303

EASTERN MICROWAVE, INC.,
Plaintiff,

v.

DOUBLEDAY SPORTS, INC.,
Defendant.

APPEARANCES:

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ORDER OF AMENDMENT

It be and hereby is ORDERED, that the Court's Memorandum-Decision and Order dated and filed March 12, 1982, be amended to add the following after the last paragraph on page 9:

"Further, it appears that there is no just reason for delaying the entry of judgment dismissing EMI's amended complaint. EMI instituted the action by requesting a declaratory judgment based on the issues that have now been decided by this Court. Although Doubleday after institution of the action raised counterclaims, the parties and the Court have treated the complaint and the counterclaims as raising separate and independent issues.

Immediately after the filing of the complaint, the parties, appearing before the Court, agreed to an expedited discovery schedule and agreed to cross-move for summary judgment, as soon as possible, on the issues raised by EMI's complaint. It was decided that by separating the issues in the complaint from those raised in the counterclaims, protracted discovery and an unduly long hearing could be avoided while the rights of the parties with respect to the issues posed in the complaint could be determined in an expeditious manner. The Court limited discovery to those issues framed by the complaint.

From the beginning of this action, the parties and Court have treated the issues raised by the complaint and by the counterclaims as totally separate and distinct. The Court's determinations which are embodied in this Order are not susceptible to revision by this Court nor will they be affected by this Court's determination of the remaining issues. Additionally, an immediate appeal on the issues decided by this Court could eliminate further litigation. Therefore, it is hereby

ORDERED and expressly directed, in accordance with Rule 54 (b) of the Federal Rules of Civil Procedure, that final judgment be entered dismissing the amended complaint."

IT IS SO ORDERED.

Neal P. McCurn
U. S. District Judge

DATED: April 24, 1982
Syracuse, New York

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF NEW YORK

CIVIL ACTION FILE No. 81-CV-303

EASTERN MICROWAVE, INC.,
Plaintiff,

vs. JUDGMENT

DOUBLEDAY SPORTS, INC.,
Defendant.

This action came on for (hearing) before the Court, Honorable Neal P. McCurn, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the amended complaint is dismissed.

I certify that this is a true copy
Attest 4/26/82

_____
Clerk, U.S. District Court

By _____
Deputy

Dated at Utica, N.Y., this 26th day of April, 1982.

.....
Clerk of Court

U. S. DISTRICT COURT
N. D. OF N. Y.
FILED COPY
Apr. 26, 1982
AT O'CLOCK M.
J. R. SCULLY, Clerk
UTICA

United States Court of Appeals

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of October one thousand nine hundred and eighty-two

Present:

HON. ELLSWORTH A. VAN GRAAFEILAND,

HON. LAWRENCE W. PIERCE,
Circuit Judges

HON. HOWARD T. MARKEY,
Ch.J. U.S. Court of Customs & Patent Appeals

No. 82-7243

EASTERN MICROWAVE, INC.,
Plaintiff-Appellant,

v.

DOUBLEDAY SPORTS, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of New York

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This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed in accordance with the opinion of this court with costs to be taxed against the appellee.

A. Daniel Fusaro, Clerk

/s/EDWARD J. GUARDARO

by Edward J. Guardaro,
Deputy Clerk

RELEVANT STATUTORY PROVISIONS

Section 101. Definitions

As used in this title, the following terms and their variant forms mean the following:

* * * * *

To perform or display a work "publicly" means—

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

* * * * *

Section 106. Exclusive rights in copyrighted works

Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures

and other audiovisual works, to perform the copyrighted work publicly; and

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

* * * * *

Section 111. Limitations on exclusive rights: Secondary transmissions

(a) Certain secondary transmissions exempted

The secondary transmission of a primary transmission embodying a performance or display of a work is not an infringement of copyright if—

* * * * *

(3) the secondary transmission is made by any carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others: *Provided,* That the provisions of this clause extend only to the activities of said carrier with respect to secondary transmissions and do not exempt from liability the activities of others with respect to their own primary or secondary transmissions . . . .

* * * * *

(c) Secondary transmissions by cable systems

(1) Subject to the provisions of clauses (2), (3) and (4) of this subsection, secondary transmissions to the public by a cable system of a primary transmission made by a broadcast

station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work shall be subject to compulsory licensing upon compliance with the requirements of subsection (d) where the carriage of the signals comprising the secondary transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission.

(2) Notwithstanding the provisions of clause (1) of this subsection, the willful or repeated secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and 509, in the following cases:

(A) where the carriage of the signals comprising the secondary transmission is not permissible under the rules, regulations, or authorizations of the Federal Communications Commission; or

(B) where the cable system has not recorded the notice specified by subsection (d) and deposited the statement of account and royalty fee required by subsection (d).

(3) Notwithstanding the provisions of clause (1) of this subsection and subject to the provisions of subsection (e) of this section, the secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and sections

509 and 510, if the content of the particular program in which the performance or display is embodied, or any commercial advertising or station announcements transmitted by the primary transmitter during, or immediately before or after, the transmission of such program, is in any way willfully altered by the cable system through changes, deletions, or additions, except for the alteration, deletion, or substitution of commercial advertisements performed by those engaged in television commercial advertising market research: *Provided,* That the research company has obtained the prior consent of the advertiser who has purchased the original commercial advertisement, the television station broadcasting that commercial advertisement, and the cable system performing the secondary transmission: *And provided further,* That such commercial alteration, deletion, or substitution is not performed for the purpose of deriving income from the sale of that commercial time.

(4) Notwithstanding the provisions of clause (1) of this subsection, the secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and section 509, if (A) with respect to Canadian signals, the community of the cable system is located more than 150 miles from the United States-Canadian border and is also located south of the forty-second parallel of latitude, or (B) with respect to Mexican signals, the secondary transmission is made by a cable system which received the primary transmission by means other than direct interception of a free space radio wave emitted by such broadcast television station, unless prior to April 15, 1976, such cable system was actually carrying, or was specifically authorized to carry, the signal of such foreign station on the system pursuant to the rules, regulations, or authorizations of the Federal Communications Commission.

(d) Compulsory license for secondary transmissions by cable systems

(1) For any secondary transmission to be subject to compulsory licensing under subsection (c), the cable system shall, at least one month before the date of the commencement of operations of the cable system or within one hundred and eighty days after the enactment of this Act, whichever is later, and thereafter within thirty days after each occasion on which the ownership or control or the signal carriage complement of the cable system changes, record in the Copyright Office a notice including a statement of the identity and address of the person who owns or operates the secondary transmission service or has power to exercise primary control over it, together with the name and location of the primary transmitter or primary transmitters whose signals are regularly carried by the cable system, and thereafter, from time to time, such further information as the Register of Copyrights, after consultation with the Copyright Royalty Tribunal (if and when the Tribunal has been constituted), shall prescribe by regulation to carry out the purpose of this clause.

(2) A cable system whose secondary transmissions have been subject to compulsory licensing under subsection (c) shall, on a semiannual basis, deposit with the Register of Copyrights, in accordance with requirements that the Register shall, after consultation with the Copyright Royalty Tribunal (if and when the Tribunal has been constituted), prescribe by regulation—

(A) a statement of account, covering the six months next preceding, specifying the number of channels on which the cable system made secondary transmissions to its subscribers, the names and locations of all primary transmitters whose transmissions were further transmitted by the cable system, the total number of subscribers, the gross amounts paid to the cable system for the basic service of providing secondary transmissions of primary broadcast

transmitters, and such other data as the Register of Copyrights may, after consultation with the Copyright Royalty Tribunal (if and when the Tribunal has been constituted), from time to time prescribe by regulation. Such statement shall also include a special statement of account covering any nonnetwork television programming that was carried by the cable system in whole or in part beyond the local service area of the primary transmitter, under rules, regulations, or authorizations of the Federal Communications Commission permitting the substitution or addition of signals under certain circumstances, together with logs showing the times, dates, stations, and programs involved in such substituted or added carriage; and

(B) except in the case of a cable system whose royalty is specified in subclause (C) or (D), a total royalty fee for the period covered by the statement, computed on the basis of specified percentages of the gross receipts from subscribers to the cable service during said period for the basic service of providing secondary transmissions of primary broadcast transmitters, as follows:

(i) 0.675 of 1 per centum of such gross receipts for the privilege of further transmitting any nonnetwork programming of a primary transmitter in whole or in part beyond the local service area of such primary transmitter, such amount to be applied against the fee, if any, payable pursuant to paragraphs (ii) through (iv);

(ii) 0.675 of 1 per centum of such gross receipts for the first distant signal equivalent;

(iii) 0.425 of 1 per centum of such gross receipts for each of the second, third, and fourth distant signal equivalents;

(iv) 0.2 of 1 per centum of such gross receipts for the fifth distant signal equivalent and each additional distant signal equivalent thereafter; and

in computing the amounts payable under paragraphs (ii) through (iv), above, any fraction of a distant signal equivalent shall be computed at its fractional value and, in the case of any cable system located partly within and partly without the local service area of a primary transmitter, gross receipts shall be limited to those gross receipts derived from subscribers located without the local service area of such primary transmitter; and

(C) if the actual gross receipts paid by subscribers to a cable system for the period covered by the statement for the basic service of providing secondary transmissions of primary broadcast transmitters total $80,000 or less, gross receipts of the cable system for the purpose of this subclause shall be computed by subtracting from such actual gross receipts the amount by which $80,000 exceeds such actual gross receipts, except that in no case shall a cable system's gross receipts be reduced to less than $3,000. The royalty fee payable under this subclause shall be 0.5 of 1 per centum, regardless of the number of distant signal equivalents, if any; and

(D) if the actual gross receipts paid by subscribers to a cable system for the period covered by the statement, for the basic service of providing secondary transmissions of primary broadcast transmitters, are more than $80,000 but less than $160,000, the royalty fee payable under this subclause shall be (i) 0.5 of 1 per centum of any gross receipts up to $80,000; and (ii) 1 per centum of any gross receipts in excess of $80,000 but less than $160,000, regardless of the number of distant signal equivalents, if any.

(3) The Register of Copyrights shall receive all fees deposited under this section and, after deducting the reasonable

costs incurred by the Copyright Office under this section, shall deposit the balance in the Treasury of the United States, in such manner as the Secretary of the Treasury directs. All funds held by the Secretary of the Treasury shall be invested in interest-bearing United States securities for later distribution with interest by the Copyright Royalty Tribunal as provided by this title. The Register shall submit to the Copyright Royalty Tribunal, on a semiannual basis, a compilation of all statements of account covering the relevant six-month period provided by clause (2) of this subsection.

(4) The royalty fees thus deposited shall, in accordance with the procedures provided by clause (5), be distributed to those among the following copyright owners who claim that their works were the subject of secondary transmissions by cable systems during the relevant semiannual period:

(A) any such owner whose work was included in a secondary transmission made by a cable system of a nonnetwork television program in whole or in part beyond the local service area of the primary transmitter; and

(B) any such owner whose work was included in a secondary transmission identified in a special statement of account deposited under clause (2)(A); and

(C) any such owner whose work was included in nonnetwork programming consisting exclusively of aural signals carried by a cable system in whole or in part beyond the local service area of the primary transmitter of such programs.

(5) The royalty fees thus deposited shall be distributed in accordance with the following procedures:

(A) During the month of July in each year, every person claiming to be entitled to compulsory license fees for secondary transmissions shall file a claim with the Copyright Royalty Tribunal, in accordance with requirements that the Tribunal shall prescribe by regulation.

Notwithstanding any provisions of the antitrust laws, for purposes of this clause any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.

(B) After the first day of August of each year, the Copyright Royalty Tribunal shall determine whether there exists a controversy concerning the distribution of royalty fees. If the Tribunal determines that no such controversy exists, it shall, after deducting its reasonable administrative costs under this section, distribute such fees to the copyright owners entitled, or to their designated agents. If the Tribunal finds the existence of a controversy, it shall, pursuant to chapter 8 of this title, conduct a proceeding to determine the distribution of royalty fees.

(C) During the pendency of any proceeding under this subsection, the Copyright Royalty Tribunal shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy.

* * * * *

(f) Definitions

As used in this section, the following terms and their variant forms mean the following:

A "primary transmission" is a transmission made to the public by the transmitting facility whose signals are being received and further transmitted by the secondary transmission service, regardless of where or when the performance or display was first transmitted.

A "secondary transmission" is the further transmitting of a primary transmission simultaneously with the primary

transmission, or nonsimultaneously with the primary transmission if by a "cable system" not located in whole or in part within the boundary of the forty-eight contiguous States, Hawaii, or Puerto Rico; *Provided, however,* That a nonsimultaneous further transmission by a cable system located in Hawaii of a primary transmission shall be deemed to be a secondary transmission if the carriage of the television broadcast signal comprising such further transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission.

A "cable system" is a facility, located in any State, Territory, Trust Territory, or Possession, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, or other communications channels to subscribing members of the public who pay for such service. For purposes of determining the royalty fee under subsection (d)(2), two or more cable systems in contiguous communities under common ownership or control or operating from one headend shall be considered as one system.

Section 501. Infringement of Copyright

(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 118, or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright.

* * * * *

EXHIBIT 11

a WORLD of difference!™

1981 NEW YORK METS BASEBALL

WOR-TV Televised Games

EXH - EXHIBITION TWI-TWI NIGHT DH - DOUBLEHEADER

EXHIBITION SCHEDULE

					NYCT
MARCH					
Mon.	23	Mets	Los Angeles	at St. Petersburg	7:30 PM
APRIL					
Thurs.	2	Mets	Cincinnati	at St. Petersburg	7:30 PM
Sun.	5	Mets	Atlanta	at St. Petersburg	1:30 PM

REGULAR SEASON SCHEDULE

Thurs.	9	Mets	Chicago	Away	2:30 PM
Sat.	11	Mets	Chicago	Away	2:15 PM
Sun.	12	Mets	Chicago	Away	2:15 PM
Tues.	14	Mets	St. Louis	Home (Open Day)	2:00 PM
Sat.	18	Mets	Montreal	Home	2:00 PM
Sun.	19	Mets	Montreal (DH)	Home	1:00 PM

APRIL					NYCT
Wed.	22	Mets	Pittsburgh	Away	7:30 PM
Sat.	25	Mets	Montreal	Away	1:30 PM
Sun.	26	Mets	Montreal	Away	1:30 PM
Wed.	29	Mets	Pittsburgh	Home	8:00 PM
MAY					
Sat.	2	Mets	San Diego	Home	2:00 PM
Sun.	3	Mets	San Diego (DH)	Home	1:00 PM
Wed.	6	Mets	San Francisco	Home	8:00 PM
Fri.	8	Mets	Los Angeles	Home	8:00 PM
Sat.	9	Mets	Los Angeles	Home	2:00 PM
Sun.	10	Mets	Los Angeles	Home	2:00 PM
Wed.	13	Mets	San Diego	Away	10:00 PM
Sat.	16	Mets	Los Angeles	Away	10:00 PM
Sun.	17	Mets	Los Angeles	Away	4:00 PM
Tues.	19	Mets	San Francisco	Away	10:30 PM
Fri.	22	Mets	St. Louis	Away	8:30 PM
Sun.	24	Mets	St. Louis	Away	2:15 PM
Mon.	25	Mets	Philadelphia	Home	2:00 PM
Wed.	27	Mets	Philadelphia	Home	8:00 PM
Fri.	29	Mets	Chicago	Home	8:00 PM
Sat.	30	Mets	Chicago	Home	2:00 PM
Sun.	31	Mets	Chicago	Home	2:00 PM
JUNE					
Wed.	3	Mets	Philadelphia	Away	7:30 PM
Fri.	5	Mets	Houston	Away	8:30 PM
Sat.	6	Mets	Houston	Away	8:30 PM
Tues.	9	Mets	Cincinnati	Home	8:00 PM
Thurs.	11	Mets	Cincinnati	Home	8:00 PM
Fri.	12	Mets	Houston	Home	8:00 PM
Sat.	13	Mets	Houston	Home	7:00 PM
Sun.	14	Mets	Houston	Home	2:00 PM
Thurs.	18	Mets	Cincinnati	Away	7:30 PM
Sat.	20	Mets	Atlanta	Away	7:30 PM
Sun.	21	Mets	Atlanta	Away	2:00 PM
Tues.	23	Mets	Montreal	Away	7:30 PM

					NYCT
JUNE					
Fri.	26	Mets	St. Louis	Home	8:00 PM
Sat.	27	Mets	St. Louis	Home	7:00 PM
Tues.	30	Mets	Chicago	Home	8:00 PM
JULY					
Wed.	1	Mets	Chicago	Home	8:00 PM
Sat.	4	Mets	Pittsburgh	Away	5:00 PM
Sun.	5	Mets	Pittsburgh (DH)	Away	1:00 PM
Tues.	7	Mets	St. Louis	Away	8:30 PM
Thurs.	9	Mets	St. Louis	Away	8:30 PM
Fri.	10	Mets	Philadelphia	Away	8:00 PM
Sat.	11	Mets	Philadelphia (DH)	Away	5:30 PM
Sun.	12	Mets	Philadelphia	Away	1:30 PM
Fri.	17	Mets	San Diego	Home	8:00 PM
Sat.	18	Mets	San Francisco	Home	7:00 PM
Sun.	19	Mets	San Francisco	Home	2:00 PM
Wed.	22	Mets	Los Angeles	Home	8:00 PM
Fri.	24	Mets	San Diego	Away	10:00 PM
Sat.	25	Mets	San Diego	Away	10:00 PM
Sun.	26	Mets	San Diego	Away	4:00 PM
Tues.	28	Mets	Los Angeles	Away	10:30 PM
Wed.	29	Mets	Los Angeles	Away	10:30 PM
Fri.	31	Mets	San Francisco	Away	10:30 PM
AUGUST					
Sat.	1	Mets	San Francisco	Away	4:00 PM
Sun.	2	Mets	San Francisco	Away	4:00 PM
Fri.	7	Mets	Pittsburgh	Home	8:00 PM
Sat.	8	Mets	Pittsburgh	Home	2:00 PM
Tues.	11	Mets	Chicago	Away	2:30 PM
Fri.	14	Mets	Philadelphia	Home	8:00 PM
Sat.	15	Mets	Philadelphia	Home	4:00 PM
Sun.	16	Mets	Philadelphia	Home	2:00 PM
Tues.	18	Mets	Atlanta	Away	7:30 PM
Sat.	22	Mets	Cincinnati	Away	7:00 PM
Sun.	23	Mets	Cincinnati	Away	2:15 PM

					NYCT
AUGUST					
Tues.	25	Mets	Houston	Home	8:00 PM
Wed.	26	Mets	Houston	Home	8:00 PM
Fri.	28	Mets	Cincinnati	Home	8:00 PM
Sat.	29	Mets	Cincinnati	Home	7:00 PM
Sun.	30	Mets	Cincinnati	Home	2:00 PM
SEPTEMBER					
Tues.	1	Mets	Houston	Away	8:30 PM
Wed.	2	Mets	Houston	Away	8:30 PM
Sat.	5	Mets	Atlanta	Home	2:00 PM
Sun.	6	Mets	Atlanta	Home	2:00 PM
Wed.	9	Mets	Pittsburgh	Away	7:30 PM
Fri.	11	Mets	St. Louis	Away	8:30 PM
Sun.	13	Mets	St. Louis	Away	2:15 PM
Tues.	15	Mets	Philadelphia	Home	8:00 PM
Wed.	16	Mets	Philadelphia	Home	8:00 PM
Sat.	19	Mets	St. Louis	Home	2:00 PM
Sun.	20	Mets	St. Louis	Home	2:00 PM
Mon.	21	Mets	Pittsburgh	Home	8:00 PM
Sat.	26	Mets	Montreal	Away	1:30 PM
Sun.	27	Mets	Montreal	Away	1:30 PM
Wed.	30	Mets	Chicago	Home	8:00 PM
OCTOBER					
Sat.	3	Mets	Montreal	Home	2:00 PM
Sun.	4	Mets	Montreal	Home	2:00 PM

EASTERN MICROWAVE, INC.
3 NORTHERN CONCOURSE
P. O. BOX 4872
SYRACUSE, NEW YORK 13221
315/455-5955

October 30, 1979

Mr. Fred Hill
LBJ Co.
Box 1209
Austin, Texas 78767

Dear Mr. Hill,

I would like to take this opportunity to introduce you to the wonderful World of WOR-TV from New York City. WOR is an independent station owned by RKO General and is one of the leading independents in the country. Let me list some of the important features of WOR:

1. 24 HOUR INDEPENDENT PROGRAMMING.

2. OVER 250 PROFESSIONAL SPORTING EVENTS.

—New York Mets Baseball.....	120 games.
—New York Islanders Hockey...	25 away games.
—New York Rangers Hockey	32 away games.
—New York Knicks Basketball..	28 away games.
—New Jersey Nets Basketball....	15 away games.
—New York Cosmos Soccer.....	13 games.
—Harness Racing.....	104 nights from Yonkers.
—Penn State Football (delayed Monday Nights).....	11 games.

3. 63 HOURS OF MOVIES A WEEK.

—Approximately 3000 film library—includes RKO Archives of Golden Oldies

4. THREE FIRST RUN GAME SHOWS:

—Tic Tac Dough
—Jokers Wild
—Dating Game

5. NON DUPLICATION

One of the most important things for you is that WOR does not duplicate WTBS or WGN anytime, any day. This allows you to give your subscribers what they want and need: **SOMETHING DIFFERENT.**

6. SIX HOURS DAILY OF LOCAL ORIGINATION.

—Joe Franklin Talk Show With Celebrities Visiting New York City.
—Romper Room
—Straight Talk Womans Show
—News

FULL TIME HERE ARE THE RATES

Our Tariff is 10¢ per subscriber for full time—$100 minimun and $3000 maximum, with 15% discount for annual prepayment.

SUBSTITUTE

Are you restricted by the F.C.C. distant signal regulation? **WHY NOT PUT WOR ON FOR SUBSTITUTE PROGRAMMING.** Fill in those blackout periods for 1¢ per subscriber, minimum $100, maximum $300, for up to 60 hours a month.

LATE NIGHT:

How about a late night package of all night movies for 2¢ per sub, minimum $100 and maximum $600? This includes three movies & news.

WOR AND EASTERN MICROWAVE, HAVE IT ALL. Jump on the WOR Bandwagon and see the WORld of difference.

Write or call me at (315) 455-5955.

HOPE TO HEAR FROM YOU SOON!!!!

Sincerely,

DIANE MILLEK
Marketing
Eastern Microwave, Inc.
A Division of Newhouse Broadcasting

DM:al

January 27, 1966

Herbert Fuchs, Esq.
Counsel, Subcommittee No. 3
Committee on the Judiciary
United States House of Representatives
Washington, D.C.

Dear Mr. Fuchs:

I am writing this letter on behalf of The American Telephone and Telegraph Company to call the Subcommittee's attention to certain ambiguities which, in the opinion of my client, may result from Section106(b)(3)(B) of the proposed 1965 Copyright Revision Bill as compared with the previous 1964 Draft.

I. You will recall that the 1964 Bill, as originally drafted, included in Section 5(b)(3)(B) a definition of performing or exhibiting a work "publicly" which read as follows:

> "to broadcast a performance or exhibition of the work to the public, or to transmit to the public a broadcast of any performance or exhibition *otherwise than as a common carrier;*"

The underscored exception has been eliminated in Section 106(b)(3)(B), which now reads as follows:

> "To transmit or otherwise communicate a performance or exhibition of the work to the public by means of any device or process."

According to the Supplementary Report of the Register of Copyrights, of May 1965, the proposed "definition is intended to cover every transmission, retransmission, or other communication of a performance which reaches 'the public'." The Supplementary Report then states, at page 25:

> "The 1964 bill contained language exempting transmissions by someone acting 'as a common carrier,' the thought being that a corporation merely leasing wires or equipment for the intermediate transmission of signals to other transmitters, rather than to the public, should not be subjected to liability to the copyright owner. It was pointed out that the concept of 'common carrier' might be extended unjustifiably to some commercial transmitters to the public, and we have therefore dropped this exception as ill-advised. *We are convinced that purely intermediate transmissions should be exempt, but that an express exemption is not necessary to exclude them.*"

While it would thus seem at first blush that in the opinion of the Copyright Office, the types of services by telephone companies referred to in the quoted section would be considered "intermediate" transmissions which would be exempt from Section 106, this question is not entirely free from doubt; it is the purpose of this letter, therefore, to recommend that some language be included or reinstated in the final draft of the bill which would explicitly exempt such operations. As pointed out in the attached separate Memorandum entitled "Telephone Company Services," (Appendix 1), some of the numerous services rendered by telephone companies in this area may transcend the concept of "intermediate" transmission, although they undoubtedly may have been intended to be covered thereby.

The attached memorandum suggests that, for the purpose of testing the impact of the proposed copyright legislation on

telephone company services, the latter can be reduced to two types.

In the first of these two types, illustrated at (4) in the memorandum, the telephone company would furnish all of the facilities involved, viz., (1) at the "sending"-end, a teletypewriter, microphone, record player, TV camera, and/or etc. to be used by the customer, (2) a cable connecting the sending-end equipment with (3) a teleprinter, loudspeaker and/or TV receiver at a public place specified by the customer where the public can see and/or hear whatever material the customer presents to the sending-end equipment.

This first type of service has some analogy to the case where a company, pursuant to a customer's order, installs, leases and maintains an organ in a theater. If unlicensed works are played on the organ, the company presumably is not an infringer for the sufficient reason that the company has no control over what works are played. But in treating of communication common carriers, the Supplementary Report finds an express exemption for them unnecessary, not for their lack of control over what works are transmitted but because of the assumed *intermediacy* of their transmissions (page 25).

This first type of service, however, would not appear to involve "purely intermediate transmissions". Looking for the two contiguous transmissions implied by "intermediate", one finds at the sending-end nothing except the customer's operation of the teletypewriter, TV camera or etc., and at the other (public) end there is nothing following the visual or audible reproduction by the telephone company equipment. (Too, this type of service would presumably not qualify as an "intermediate transmission of signals to other transmitters, rather than to the public.")

The second of the two types of service is the service offered to CATV operators, (3) in the memorandum. Here one might easily assume that the transmission by the telephone company

is a "purely intermediate transmission". At least one can identify at the sending-end the CATV operator's antenna and electronic equipment, and at the other end a TV receiver and electrical connections between the receiver and the telephone company's cable. Too, it might be said that the telephone company is engaged in the "transmission of signals to other transmitters, rather than to the public," on the theory that the CATV operator is that "other transmitter" by virtue of its making (or directing its patron to make) the electrical connection between cable and TV receiver.

The question with regard to this second type of service is rather whether the construction that must be put on Section 106(b)(3)(B) to make it applicable to CATV operators, as expressly intended, would make it equally applicable to the foregoing telephone company service.

It must be that the CATV operator is deemed to transmit "to the public" by virtue of the fact that he delivers "signals" (a "transmission embodying a performance or exhibition"?) to the public's TV receivers and despite the fact that he (like the radio broadcaster) does not himself "show images" or "make the sounds available". In the telephone company's service the signals are delivered by the company, if not quite to the patron's TV receiver, to the short pair of wires the CATV operator connects between the company's cable and the patron's receiver. But this simple connection would seem to afford a very feeble and technical basis for making a distinction, and it is entirely possible that in many cases, or in future, the telephone company cable will extend through the patron's premises to his TV receiver thus dispensing with even the short interposed wiring. Query, then, whether in the latter case the telephone company's transmission is not as much "to the public" as the CATV operator's transmission.

At the other end of the CATV system, the CATV operator, in the simplest case, passively transmits without change the

signals received from a preceding signal transmitter, viz., the broadcaster. The telephone company, similarly, passively transmits without change the signals received from a preceding signal transmitter, viz., the CATV operator. Query, then, what it is in the bill that can be relied upon to distinguish between the two operations, that of the telephone company on the one hand and that of the CATV operator on the other.

Apart from the bill, the two operations differ significantly, of course. For one, the telephone company has no control over selection of the material to be transmitted; the CATV operator, on the other hand, selects the material to be transmitted, if only to the extent of selecting the broadcasting transmitter(s) to which his antenna(s) shall be pointed and to which his receiving equipment shall be tuned. For another, the service furnished by the telephone company to the CATV operator is a service which the telephone company is committed, by virtue of the tariff, to furnish on demand to others, i.e., to other prospective *CATV operators* who might also wish to have the telephone company provide *cable distribution networks* for their use. The CATV operator, on the other hand, if deemed to be a common carrier and so required to file tariffs, would not be committed to provide networks for other CATV operators but rather to furnish any prospective *patron* with service and with whatever connections might be required on the premises for such service. For still another, the telephone company's business relations are solely with the CATV operator and not with the latter's patrons.

For these reasons, it is recommended that Section 106(b)(3)(B) should be reworded so as to read:

> "to transmit . . . or communicate . . . otherwise than as a common carrier having no control over the selection of the works to be transmitted or communicated."

The proposed language would not reintroduce as broad an exemption with regard to common carriers as had been included in the 1964 version and would not, therefore, exclude CATV operators generally but would only cover the services of those carriers who have no control whatever over the selection of the transmitted or communicated works.

Respectfully submitted,

.....

Walter J. Derenberg

WJD: DH
enclosure - Appendix 1.

TELEPHONE COMPANY SERVICES

Common carrier communication services of possible interest in the present connection include the following:

1. A first typical service is that furnished by the telephone company to customers engaged in the "wired music" business. Here, in a simple case, the customer operates a record player which delivers sound-bearing electrical signals to an electrical distribution network which is furnished by the telephone company and through which the signals are delivered to restaurants or other public places specified by the customer. Loudspeaking equipment for converting the signals to sound is provided at each such place either by the customer or by *his* customer.

2. Analogous to the "wired music" service are the various closed-circuit television services furnished by the telephone company:

   1. *Theater TV.* The customer provides and operates TV camera and associated equipment at the site of a sporting event, e.g., and there delivers the electrical signals to a distribution network furnished by the telephone company. The signals transmitted through the network are delivered to various theaters specified by the customer. The latter provides and operates equipment at the theaters for translating the signals into images and sounds for the benefit of the theater audiences.

   2. *Educational TV.* This is essentially the same as Theater TV with the theaters replaced by class rooms or auditoriums in school buildings, and the sports event replaced by educational material, filmed, recorded and/or live. The customer may be a Board of Education or a unit of a State government.

   Whether the customer so conducts his operations as to qualify for an exemption under Section 109 is beyond the knowledge and control of the telephone company.

3. *Industrial TV.* As above. Headquarters communicates over telephone company cables with employee assemblages at plants around the country.

3. Still another telephone company service which also involves the furnishing of "channel facilities" to the customer is the electrical transmission service offered to companies in the CATV business. In this case the CATV operator owns and controls the (intercept) antenna and associated electronic receiving equipment; the telephone company owns and controls a distribution network including a cable extending from the antenna, through branch cables, to terminals on the premises of each of the CATV's patrons; and the CATV operator provides each of its patrons with whatever electrical wiring and equipment is needed between its patron's TV receiving set and the aforesaid telephone company cable terminals on the premises.

4. Another class of telephone company service is used typically by customers who are in the business of supplying financial and other news to brokerage houses. The telephone company furnishes its customers with a teletypewriter at the "sending"-end of the system and with teleprinters (a form of electric typewriter) which are placed in the public rooms of the customer's patrons. The telephone company furnishes also cables connecting the teletypewriter with all of the teleprinters, so that whatever message the customer types on the teletypewriter will be printed on paper at each teleprinter for the public (i.e., the broker's customers) to read.

Some or all of the equipment is owned and maintained by the telephone company.

5. A different type of service is represented by the announcement services in which a subscriber to the service can, by appropriate dialing, use his company-provided telephone set to reach a tape recorder in the telephone central office and to record thereon an announcement or other message.

Telephone subscribers who wish to hear the announcement can do so by calling the assigned number(s).

In this case, the "public" is reached seriatim (or a few at a time).

6. The following are general comments on the services enumerated above:

Tariffs

a. All of the services are furnished pursuant to tariffs filed with the appropriate State and Federal regulatory bodies. The charges for any particular service are specified in the tariff. They do *not* vary from one customer to another depending on how profitable or unprofitable the customer's enterprise proves to be.

b. The telephone company charges only *its* customer and not its customer's customer (cf. 1, 2.1 and 3, e.g.).

Equipment

c. The equipment furnished by the telephone company in connection with any of the services is not sold or leased to the customer; the latter has rather the use of such equipment as an incident to the service.

d. Although in describing some of the services, reference is made above to "cables", it should be understood that the cable may include electrical amplifiers at intervals and, at its terminals, coupling equipment for connecting the cable with a customer's own equipment; and that the "cable" may in fact be replaced in whole or part by one or more radio links where long distances are involved.

Control

e. In none of the enumerated services does the telephone company have any control over the possible inclusion of unlicensed copyrighted works in the material its customer selects for transmission.

No. 82-957

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

DOUBLEDAY SPORTS, INC.,
Petitioner,

v.

EASTERN MICROWAVE, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

JOHN D. MATTHEWS
RICHARD D. MARKS
*ARNOLD P. LUTZKER
JOHN P. SCHNITKER
DAVID J. WITTENSTEIN

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One Lincoln Center
Syracuse, New York 13202
(315) 422-0121

Dated: January 7, 1983

**Counsel of Record*

COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW[1]

1. Whether the Court of Appeals correctly concluded that Eastern Microwave, Inc.'s intermediary retransmission of television signals is exempt under the carrier exemption of the Copyright Revision Act, 17 U.S.C. Section 111(a)(3).

[1] Newhouse Broadcasting Corporation is the parent corporation of respondent Eastern Microwave, Inc.

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TABLE OF AUTHORITIES

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Second Circuit has now been reported at 691 F.2d 125 (2d Cir. 1982) ("*Opinion*"). The decision of the United States District Court for the Northern District of New York appears at 534 F.Supp. 533 (N.D.N.Y. 1982).

COUNTERSTATEMENT OF THE CASE

Eastern Microwave, Inc. ("EMI") is licensed as a common carrier by the Federal Communications Commission ("FCC")

to deliver television signals to cable systems throughout the United States. Since 1965, EMI has operated a network of terrestrial microwave stations to pick up television signals, including WOR-TV, New York, New York, off-the-air[2] and retransmit them to cable television systems. Since 1979, EMI has also retransmitted WOR-TV to cable systems throughout the United States using a satellite transponder leased from RCA.

EMI delivers television signals at the express request of cable systems. The record is clear that EMI does not in any way alter the programming of the television signals it retransmits. In all cases, EMI serves as an intermediary between the transmitting television station and the receiving cable system. The cable operator, not EMI, brings the signal into subscribers' homes. Delivery of television signals by carriers is essential to the provision of distant television programming by cable operators to subscribers.

As a result of the Copyright Revision Act of 1976[3] ("the Act"), cable systems are granted a compulsory license to retransmit television programming to cable subscribers. 17 U.S.C. § 111. Under the Act, copyright owners have no right whatsoever to control cable operators' use of television programming.

Compulsory licensing substitutes for direct negotiation between cable operators and copyright owners because Congress concluded that such negotiations would be burdensome and would undermine an efficient system of cable retransmission of television signals. Cable operators pay the Copyright Office a statutory fee based upon cable revenues for the right to deliver distant signals to subscribers. Generally, a cable system's fee increases with the number of subscribers. The Copyright Royalty Tribunal distributes the royalty proceeds to copyright owners.

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[2] Currently, EMI delivers sixteen signals via its terrestrial microwave system.

[3] Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as amended at 17 U.S.C. §§ 101-810 (1976 & Supp. V 1981)).

Doubleday Sports, Inc. ("Doubleday") is the copyright owner of television broadcasts of the New York Mets' baseball games carried on WOR-TV. After Doubleday threatened to file suit claiming that EMI's retransmission of Mets' games constituted copyright infringement, EMI sought a declaratory ruling that, as an intermediary common carrier,[4] it qualified for the carrier exemption in Section 111(a)(3) of the Act.[5] Essentially, that exemption provides that a carrier is not liable for copyright infringement if it serves as a passive intermediary in delivering television signals to cable systems.

The Court of Appeals (per Markey, J., C.C.P.A., sitting by designation) carefully analyzed the legislative history and purposes of the Act and unanimously concluded that, on the facts of this case, EMI qualified for the carrier exemption.[6] Doubleday seeks review of that holding.

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[4] The FCC granted EMI common carrier status in *Eastern Microwave, Inc.*, 70 F.C.C.2d 2195 (1979).

[5] Section 111(a)(3) provides in pertinent part:

> Section 111. Limitations on exclusive rights: Secondary transmissions
>
> (a) Certain Secondary Transmissions Exempted.—The secondary transmission of a primary transmission embodying a performance or display of a work is not an infringement of copyright if—
>
> . . . .
>
> (3) the secondary transmission is made by any carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others: *Provided*, That the provisions of this clause extend only to the activities of said carrier with respect to secondary transmissions and do not exempt from liability the activities of others with respect to their own primary or secondary transmissions . . . .

[6] In the proceeding below, EMI also argued that its retransmissions did not constitute a "public performance" of Doubleday's work. The Court of Appeals expressly concluded that it did not need to reach the public performance issue. *Opinion*, 691 F.2d at 127 n.5 (Pet. App. 5a). Doubleday's speculation on this point (Petition at 8) erroneously describes the Court of Appeals' ruling on that issue. *See Opinion*, 691 F.2d at 132 n.16 (Pet. App. 14a-15a).

REASONS FOR DENYING THE WRIT

This case presents no federal question requiring resolution by this Court. The Court of Appeals' decision comports with the Act's compulsory license scheme for cable television. Entities holding a copyright in distant, non-network programming will continue to receive royalties according to the Act's formula; common carriers will be able to serve an intermediary role; and cable systems will maintain service to subscribers. As a result, more systems will receive WOR-TV via EMI's retransmission, and more royalties will be paid for distribution to copyright owners, including Doubleday.

I. The Court Of Appeals' Decision Fits The Copyright Act's Structure And Policy

Doubleday argues that review is needed because the Court of Appeals upset Congress' "careful balance," the central element of which is the Act's preservation of a "substantial measure" of copyright owners' control over cable use of programming. Petition at 13. This is dramatic contrivance. Section 111's compulsory license scheme is specifically designed to deny copyright owners any control over programming on cable.[7] By enacting the compulsory license, Congress decreed that public interests other than those of the copyright owner must be considered. The Act's comprehensive structure permits cable systems to select distant signals for import without Doubleday's permission. In return, Doubleday's copyright royalties increase as more paying subscribers receive WOR-TV's programming.[8]

By affirming the carrier's intermediary role, the Court of Appeals' decision advances the Act's purposes, rather than

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[7] The Section is entitled "*Limitations* on exclusive rights: Secondary transmissions" (emphasis supplied).

[8] The royalty distribution process has already paid tens of millions of dollars to copyright owners, refuting Doubleday's claim that the value of its copyright "will deteriorate to insignificance." Petition at 7. *National Association of Broadcasters v. Copyright Royalty Tribunal*, 675 F.2d 367 (D.C. Cir. 1982), *aff'g* 45 Fed. Reg. 63026 (1980); *1979 Cable Royalty Distribution Determination*, 47 Fed. Reg. 9879 (1982), *appeal docketed sub nom. Christian Broadcasting Network v. Copyright Royalty Tribunal*, Nos. 82-1312 *et al.* (D.C. Cir. Mar. 24, 1982).

subverting them. In fact, had the Court of Appeals reached the opposite result and denied EMI the benefit of Section 111(a)(3)'s carrier exemption, then copyright owners would have reaped unintended advantages: ironclad blackout rights (the right to refuse to bargain for realistic royalty rates) and double royalty payments (from carriers and from the cable systems) for the same secondary transmission. This windfall would be expressly contrary to Congress' intent in creating the compulsory licensing scheme. *See* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 89 (1976). A copyright owner's right to prevent cable retransmission of television programming would, in effect, have resuscitated the system of "retransmission consent" that Congress explicitly rejected. *See Malrite T.V. of New York v. FCC*, 652 F.2d 1140, 1146-1147 (2d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982).

II. The Court Of Appeals Correctly Interpreted The Copyright Act's Carrier Exemption

Doubleday urges this Court to review whether EMI "selected" the signal of WOR-TV for retransmission and whether EMI's normal business and promotional activities constitute more than provision of a channel of communication under Section 111(a)(3). However, these issues were fairly resolved by the Court of Appeals and do not merit further review.

The critical phrase in Section 111(a)(3), for purposes of this case, is: "any carrier who has no direct or indirect control over the content or selection of the primary transmission." Doubleday asserts that EMI "selects" WOR-TV to be carried to cable systems, and so voids the exemption. Petition at 8-10.

"[C]ontrol over the content or selection of the primary transmission" is, due to its grammar, susceptible of various meanings. If a cable system chooses to offer WOR-TV when a carrier transports the signal to the cable headend, which party actually "selects" the station? The answer cannot be found in the uncertain structure of Section 111(a)(3) alone, so resort must be had to legislative history.

The sources cited by Doubleday (Petition at 9-10), including Professor Walter J. Derenberg's letter to Herbert Fuchs, Pet. App. 56a-64a, relevant House and Senate Reports,

and subsequent draft revisions of the Act, were all analyzed by the Court of Appeals. The Court of Appeals concluded that Section 111(a)(3) was designed to distinguish between carriers such as phone companies, which provide cable systems with distant television signals, and cable systems, which deliver the signals directly to the public. (Professor Derenberg uses the term "patron.") The cable operator bears copyright liability because he is the one offering the service—selecting which signals will be provided—directly to the public. Unless an entity is dealing directly with such patrons, it is an intermediary, entitled (like the telephone company in Professor Derenberg's example) to the exemption so long as it performs only as a conduit, without altering the primary transmission (the distant television signal). *Accord, WGN Continental Broadcasting Company v. United Video, Inc.*, 685 F.2d 218 (7th Cir. 1982). *See Opinion*, 691 F.2d at 132 n.16 (Pet. App. 14a-15a).

The Court of Appeals' careful analysis of the Act applies this common-sense distinction to EMI's operation. *Opinion*, 691 F.2d at 130-131 (Pet. App. 11a-12a). EMI is not a telephone company, but it is a conduit, providing an unaltered distant television signal to cable systems that select WOR-TV as part of their service to the public. EMI does not deal with the systems' patrons. It delivers WOR-TV only because the signal is used by cable systems, again in accord with Professor Derenberg's example. Therefore, within the meaning of Section 111(a)(3), EMI does not control the content nor selection of the signal, and the exemption is properly applied to EMI.

The use of legislative history to illuminate the meaning of Section 111(a)(3) is necessary precisely because "words of general meaning" in a statute take on a particular meaning in the context "of the circumstances surrounding [the statute's] enactment, or of the absurd results which follow from giving such broad meaning to the words." *Church of The Holy Trinity v. United States*, 143 U.S. 457, 459 (1892). *Accord, United States v. American Trucking Associations, Inc.*, 310 U.S. 534, 543-544 (1940). Unlike the District Court's opinion,[9] the

[9] The District Court's ruling interpreted the exemption under Section 111(a)(3) without once mentioning the painstakingly-crafted compulsory licensing scheme of the Act.

Court of Appeals' decision implements the statute's " 'purpose or object.' " *Watt v. Alaska,* 451 U.S. 259, 266 (1981) (quoting *Cabell v. Markham,* 148 F.2d 737, 739 (2d Cir.) (L. Hand, J.), *aff'd,* 326 U.S. 404 (1945)).

Doubleday claims this result is "anomalous." Petition at 10. In fact, the opposite is true. Under the Act, copyright owners are compensated for cable carriage from fees paid by cable systems. Delivery to cable viewers is the basis for the rates. Congress intended precisely this result, just as it aimed to deny copyright holders any control over the cable carriage of their televised material.

In sum, this case presents no important federal issue which requires resolution by this Court. The issue is a narrow one which, having been properly resolved, allows the compulsory licensing scheme of the Act to operate as intended by Congress. Copyright owners will be adequately compensated, cable systems will have programming available for delivery to subscribers, and carriers will continue to perform their intermediary role.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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In accordance with Rules 22.1 and 28.3 of the Rules of the Supreme Court of the United States, I hereby certify that three copies of the foregoing Brief for Respondent in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit were delivered by hand to the following counsel for the Petitioner on this 7th day of January, 1983.

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No. 82-957

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

DOUBLEDAY SPORTS, INC.,
Petitioner,

v.

EASTERN MICROWAVE, INC.
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

ARGUMENT

1. Recent legislative developments confirm that the issue presented by Doubleday Sports' petition for certiorari is important. Those developments also underscore the significant error made by the court of appeals.

In H.R. 5949, a bill originating in the House of Representatives at the last session of Congress, partisans of Eastern Microwave, the respondent here, unsuccessfully sought legislation that, among other things, would have overturned the decision of the district court below, which was favorable to

Doubleday Sports. The bill died in the Senate in December 1982. In commenting on the legislation, Senator Mathias, a sponsor of the Copyright Revision Act of 1976, said:

> "Any proposal to exempt resale carriers from liability raises serious questions of copyright policy—issues which the substantive Senate committees simply were unable to address in this Congress. Section 101a [of H.R. 5949] is seemingly inconsistent with the principle of the copyright law, which provides generally that each separate use of a copyright product—including a sports owner's televised transmissions of its games—requires compensation to the copyright owner. *The 1976 act included a very narrow exception to this liability for a traditional 'passive' common carrier, such as AT&T, which merely acts as a conduit between the sender and receiver of a signal. The amendment would change the present law to exempt a whole new group of resale carriers.*
>
> . . .
>
> "*This amendment would be a major change in the present copyright law and represents a sharp departure from prior policy. . . .*
>
> "Certainly, any statute dealing with such a fluid and dynamic field as cable television requires review from time to time, and it is possible that the Congress could be convinced that there is some public benefit in eliminating copyright liability for resale carriers which are not now exempted by the 1976 act. *However, this is such a significant reversal both of policy and of the law's explicit provisions that any change should be made thoughtfully and only after the most persuasive hearing.*" 128 Cong. Rec. S. 16006 (Dec. 21, 1982) (daily ed.) (emphasis supplied).

2. EMI's brief in opposition confirms that the court below improperly substituted its conception of a satisfactory copyright regime for the statute enacted by Congress. If, as EMI and the court of appeals would have it, Congress intended to immunize

from copyright liability any intermediate carrier of off-the-air television signals to cable systems, Congress easily could have done so. It did not. Instead, in Section 111(a)(3) of the Copyright Revision Act, Congress adopted language that limits, as plainly as words will allow, such immunity to certain carefully defined intermediate carriers. In the words of the statute, these carriers must have "no direct or indirect control" over "the content or selection" of the signals retransmitted, nor over the "particular recipients" of the retransmissions; and the activities of such carriers with respect to their retransmissions must "consist solely of providing wires, cables, or other communications channels" for others.

Contrary to EMI's contention, the interpretation of the Copyright Act urged by Doubleday Sports does not leave cable systems in a void. Cable systems remain free under the Act, subject to the compulsory license scheme, to order truly passive intermediate carriers to retransmit signals selected by the cable systems for viewing by the systems' customers. Carriers responding to such orders can satisfy the tests prescribed by Section 111(a)(3) for exemption from copyright liability. But EMI's activities—especially its selection of the WOR-TV signal for satellite retransmission, and its aggressive marketing of that signal to potential customers around the country—plainly disqualify it from claiming the exemption.

3. The court of appeals acknowledged that EMI makes a "type of selection" (App. 11a). EMI's best answer to the contention that its selection is precisely the one proscribed by the Act is that the statutory language is unclear (Br. Opp. 5). But the word "selection" is not ambiguous. Plainly, EMI "selects" the WOR-TV signal when it exercises its marketing judgment on the basis of the substantive content of the signal chosen, and offers it to cable systems around the country.

Those "cable systems are granted a compulsory license to retransmit television programming to cable subscribers" (Br. Opp. 2). But EMI is not a cable system. It has no compulsory license. It cannot shelter itself under the compulsory license regime. That Congress granted cable systems such a license does not entitle entrepreneurs like EMI to interject themselves

with impunity between conventional television stations on the one hand and cable systems on the other. EMI has no statutory license to expropriate the off-the-air signal of WOR-TV for promotion and marketing to hundreds of cable systems all over the country, without seeking leave of the copyright holders of WOR's programming and without compensating those holders for the commercial use of their property.

4. Having conceded, in effect, that the language of Section 111(a)(3) does not support the court of appeals' holding, and further conceding that "the use of legislative history to illuminate the meaning of Section 111(a)(3) is necessary" (Br. Opp. 6), EMI underscores the error below by asserting erroneously that the court of appeals "carefully analyzed the legislative history . . . of the Act" (*id.* at 3). The court did no such thing. Its opinion is critically deficient in this respect.[1]

The court's silence is understandable in two respects. *First,* the legislative history of Section 111(a)(3) discloses that Congress modified the copyright revision bill at the behest of the telephone company, in order to preclude any potential liability under the new law to that entity as an intermediate carrier of long-lines terrestrial retransmissions to cable system customers. The relevant legislative materials are collected in the petition for certiorari at 9-10.

Second, the legislative history also discloses that when Congress used the word "selection," it had in mind precisely the kind of activity at issue here, albeit by cable systems (Pet. Br. 9-10). That cable systems took the retransmitted signals entire and without edits made no difference; the selection of broadcast signals engaged in by cable systems would have disqualified them from the exemption. Accordingly, cable systems need the compulsory license in order not to be subject to full copyright liability. EMI has no such license.

5. EMI also bemoans the difficulty that cable systems

[1] The sole reference to the legislative history in the opinion below occurs in conjunction with the court's discussion of the "public performance" issue—a different question from the one presented here, and one that the court of appeals did not reach in light of its disposition of EMI's appeal (App. 14a n.16).

supposedly would encounter if required to negotiate directly with copyright holders (Br. Opp. 2). Senator Mathias disposed of this point in his December 1982 statement:

> "One of the major justifications for this amendment is the claim that it is essential to preserve the compulsory license for cable systems set forth in section 111 of the act. *However, both the administration and the Copyright Office disagree.*
>
> "The Register of Copyrights pointed out in testimony in 1979 that even if local cable systems might not be able to negotiate individually with program rights holders, *satellite resale carriers are in position to act as a 'central agent in obtaining retransmission rights and to relay programming.'* The National Telecommunications and Information Administration of the Department of Commerce also concurs." 128 Cong. Rec. S. 16006 (Dec. 21, 1982) (daily ed.) (emphasis supplied).

6. Finally, the briefs *amici* submitted by Columbia Broadcasting System, Inc. and the Motion Picture Association of America confirm that the question presented by Doubleday Sports' petition for certiorari is important to the administration of the Copyright Act. The decision below implicates the interests of copyright holders and conventional broadcasters throughout the country. If the decision is left intact, entrepreneurs like EMI will have the legal authority to retransmit copyrighted material to cable systems nationwide without liability of any kind under the copyright scheme. The court of appeals' wholesale immunization of such commercial exploitation will deprive copyright holders of control over their product. With the increase of satellite retransmission facilities and the proliferation of exploiters like EMI, the commercial losses suffered by copyright holders will multiply.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the petition for a writ of certiorari and the briefs *amici*, petitioner, Doubleday Sports, Inc., respectfully submits that the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

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In accordance with Rules 19.3 and 28.5 of the Rules of the Supreme Court of the United States, I hereby certify that three copies of the foregoing Reply Brief For Petitioner were mailed via First Class, United States Mail, postage prepaid to the following counsel on this 20th day of January, 1983.

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No. 82-957

IN THE
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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION OF CBS INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI AND BRIEF AMICUS CURIAE

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MOTION OF CBS INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

CBS Inc. ("CBS") respectfully moves the Court for leave to file the attached brief *amicus curiae* supporting the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit. Counsel for the petitioner has consented to the filing of the attached brief. CBS was unable to obtain consent from counsel for the respondent.

The interest of CBS is set forth at pages 1-3 of the attached brief. In summary, CBS, in addition to being a copyright owner, owns five television stations (including WCBS-TV, whose signal is retransmitted at certain times of day by respondent) and operates the CBS Television Network. The five CBS-owned stations and the CBS network transmit copyrighted television programs and feature films. The court of appeals, departing from the plain language of the Copyright Act, fashioned an exemption from copyright liability for certain nonpassive secondary transmitters of copyrighted television programming. The CBS brief discusses the potential impact of that decision on the competitive position of royalty-paying broadcasters and distributors of television programming. This is an interest that the petitioner (a copyright owner) does not represent or fully discuss. It further demonstrates the importance of the question raised by the petition.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF CBS INC. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CBS Inc. ("CBS") respectfully submits this brief *amicus curiae* in support of the Petition for a Writ of Certiorari.

INTEREST OF AMICUS CURIAE

CBS owns five television stations (including WCBS-TV, whose signal is retransmitted at certain times of the day by respondent Eastern Microwave, Inc., or "EMI") that broadcast copyrighted television programs and feature films. CBS operates the CBS Television Network, over which it distributes copyrighted television programs

and feature films to the five CBS-owned stations and to some 200 other affiliated stations. And CBS produces copyrighted audiovisual works which it licenses to royalty-paying cable networks that distribute the works to cable systems. CBS pays substantial amounts, either as creator or as licensee, for copyrighted programming for television and cable. Its activities will be directly affected by the holding of the court of appeals that companies like EMI are at liberty to create royalty-free cable networks by appropriating broadcast television signals containing copyrighted works, transporting them via satellite or microwave to areas where they cannot be received off the air, and marketing them for profit in competition with broadcast and cable networks, local broadcasters, and others who pay copyright royalties—all without obtaining any authorization from, or paying any compensation to, the owners of copyright in those works.

Congress made clear when it rewrote the Copyright Act in 1976 that owners of copyrighted television programming are entitled to compensation for the use of their intellectual property. It gave the copyright owner the exclusive right to perform publicly (or authorize the public performance of) his audiovisual work. 17 U.S.C. § 106(4) (1976 & Supp. V 1981). It protected the interest of cable television systems in assuring the continued availability of programming by creating a limited compulsory license under which cable television systems could, by filing a notice and paying royalties, obtain the right to retransmit copyrighted broadcasts. 17 U.S.C. § 111(c) (1976 & Supp. V 1981). And Congress exempted passive carriers like the telephone company, which merely make facilities available for others to use, from copyright liability. 17 U.S.C. § 111(a)(3) (1976 & Supp. V 1981). But Congress did not create any compulsory license or exemption for a nonpassive secondary transmitter like respondent to run a royalty-free, network cable program supply service by actively selecting and marketing broadcast television signals for its own profit.

The court of appeals' decision expanding the telephone company exemption to cover companies like EMI threatens the balance struck by Congress in 1976. The decision limits in a manner not intended by Congress the right of copyright owners to exploit their property. It places royalty-paying distributors and broadcasters of copyrighted television programming at a competitive disadvantage. And the decision opens the door to further erosion of the intellectual property rights that provide the incentive for the creative endeavors on which CBS and the entire television industry depend.

ARGUMENT

A. The Decision Below

The specific question presented to the Court in this case is whether companies like EMI, which select the signals of particular broadcast television stations on the basis of the copyrighted programming they contain, retransmit them without editing, and actively market them to cable system customers, all without either authorization from copyright owners or a statutory license, are exempt from copyright liability as purely passive common carriers. The district court held, first, that EMI's unlicensed retransmissions constitute unauthorized public performances which, unless exempt, violate petitioner's exclusive right under Section 106(4) to perform publicly (or to authorize the public performance of) its copyrighted works. The district court then held that EMI does not qualify for the Section 111(a)(3) "passive carrier" exemption because, in the words of the statute, it exercises "control over the . . . selection of the primary transmission." The court of appeals did not reach or disturb the finding that EMI's retransmissions are unauthorized public performances. It held, however, that these otherwise actionable infringements of petitioner's exclusive rights under Section 106(4) are exempt under Section 111(a)(3).

The court of appeals' decision ignores the plain language and purpose of the statutory exemption. Section 111(a)(3) on its face applies only to secondary transmitters (a) that exercise no control over the content or selection of what they retransmit *and* (b) that do not control the recipients of the retransmission *and* (c) whose activities consist solely of providing wires, cables, or other communications channels for the use of others. The legislative history makes clear that the exemption was intended to protect only passive secondary transmitters like the telephone company which market only their facilities and have no commercial interest in the programming that is carried.[1]

EMI fails all three of the statutory tests. As the court of appeals acknowledged, EMI engages in "a type of 'selection'" of the WOR-TV signal: it *chooses* that signal and no other to transmit via its satellite transponder.[2] EMI also controls who will receive the signal it retransmits. And EMI is not merely making available wires,

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[1] Section 111(a)(3) has its origins in a 1966 letter written on behalf of AT&T by Walter J. Derenberg, expressing concern over the absence from the pending copyright revision legislation of an express exemption for certain retransmission activities by the telephone company. Letter of Walter J. Derenberg to Herbert Fuchs, Counsel, Subcommittee No. 3, House Comm. on the Judiciary, dated January 27, 1966 (reproduced at Petitioner's App. 56a-64a). The Register of Copyrights has subsequently testified that the insulation of the telephone company was "the only thought that anybody had" at the time Section 111(a)(3) was adopted. *Copyright Issues: Cable Television and Performance Rights, Hearings before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 32 (1979) (statement of Barbara Ringer, Register of Copyrights).

As recently as December 21, 1982, Senator Mathias, a sponsor of the 1976 Copyright Revision Act, reiterated on the Senate floor that Section 111(a)(3) was designed to reach only "traditional 'passive' common carrier[s]" that act merely as a conduit between the sender and receiver of a signal. 128 Cong. Rec. S16,006 (daily ed. Dec. 21, 1982).

[2] Petitioner's App. 11a.

cables, and other communications channels for the use of others: it is using them itself to sell the copyrighted works contained in the signal of WOR-TV. As the district court aptly concluded, "AT&T markets its services; EMI markets a product"—the copyrighted property of petitioner and other copyright owners.[3]

The court of appeals concluded that EMI's selection of WOR-TV's signal for retransmission could be disregarded for purposes of Section 111(a)(3) because EMI has only one transponder and therefore can carry only one signal. This was plain error. All transmission facilities, including the telephone company's, are finite. The question is who decides what signal or signals will be carried. The answer is that EMI does and the telephone company does not. Congress clearly and for good reason limited the Section 111(a)(3) exemption to those who do not.

B. The Importance of the Question

The court of appeals' departure from the plain language of Section 111(a)(3) is important.

In the first place, the activities of companies like EMI are a large and growing area of economic activity. As recently as 1976, the retransmission activities of companies like EMI were geographically constrained by the cost, limited range and narrow transmission paths of terrestrial microwave facilities. With the advent of satellites dedicated to serving cable television systems, however, companies like EMI now can reach virtually every cable system (and, potentially, nearly every home) in the United States. This is a startling change. Whereas EMI once brought New York City television to a few cable systems in upstate New York, EMI now blankets the country with a broadcast signal selected and marketed on the basis of its copyrighted content. In doing so, EMI performs essentially the same distribution function as a

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[3] Petitioner's App. 30a.

broadcast or cable network or a national syndicator. But, under the court of appeals' ruling, companies like EMI, unlike conventional networks and syndicators, have no obligation to compensate copyright owners for the privilege of using and profiting from their copyrighted works.

That ruling was wrong. If money is to be made by selling the New York Mets' games to distant cable systems, the right to make it belongs in the first instance to the Mets, not to a wholly unauthorized network cable program supply service trying to peek through a statutory knothole. The right to exploit the market for intellectual property belongs to the copyright owner. *See, e.g., Goldstein v. California*, 412 U.S. 546, 555 (1973). It is no answer to say that the cable systems that receive EMI's transmissions are themselves statutorily licensed (and pay royalties): as the district court held, the retransmission *to* the cable system is a distinct infringing use of the copyrighted property, a use that is not covered by or compensated under the compulsory license and is not exempt.[4]

Nor was it appropriate for the court of appeals to depart from the language of the statute in order to balance the interests of the copyright owner against the interests of the cable television industry and render a decision that in its view would maximize the public good. As this Court has made clear, "that job is for Congress." *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 401-02 (1968). The proper balance between the interest of copyright owners in controlling and exploiting their broadcast works and the interest of cable

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[4] The court of appeals reasoned that the royalties paid by cable systems under the compulsory license cover respondent's retransmissions and that treating those retransmissions as an infringement would result in a "double payment." Such reasoning puts the matter backwards: The compulsory license royalty rates paid by cable systems are set in light of the limited scope of the Section 111(a)(3) exemption.

systems and other secondary transmitters in using those works has been and continues to be a matter of intense legislative debate. Indeed, the lack of consensus on that issue was one of the primary reasons why the process of revising the Copyright Act took more than a decade. Section 111 of the 1976 Act represents a carefully considered compromise designed to accommodate these interests. The expansion of Section 111(a)(3) by the court of appeals to permit companies like EMI to select and market any television signal they wish (as long as they do not edit the content of the programming) without having to secure a license from or pay compensation to the owners of the programming upsets that balance by depriving copyright owners of their right to exploit present and future resale markets.

Moreover, although the court of appeals apparently intended to exempt only companies that retransmit signals to cable systems, its reading of Section 111(a)(3) is not so limited. The day is fast approaching when retransmission directly from a satellite to an individual's home will be commonplace. Under the court of appeals' decision, a firm retransmitting WOR-TV's signal via satellite directly to subscribers' homes could apparently claim the Section 111(a)(3) exemption despite the fact that its customers would not be subject to any licensing or royalty obligation.

The court of appeals overrode the distinction between firms that are in a position to decide that a portion of the public shall receive one signal and not another and passive carriers like the telephone company that merely provide facilities for others to use. That distinction, which is fundamental to defining rights and obligations not only under the Copyright Act but also under the Communications Act and First Amendment, could not be more plainly put than it is in Section 111(a)(3). Its willful disregard can mean no end of mischief.

CONCLUSION

For the foregoing reasons, CBS respectfully urges the Court to grant the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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January 7, 1983

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DOUBLEDAY SPORTS, INC.,
Petitioner,

v.

EASTERN MICROWAVE, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION OF MOTION PICTURE ASSOCIATION OF AMERICA, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF AMICUS CURIAE

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January 7, 1983

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-

DOUBLEDAY SPORTS, INC.

Petitioner,

v.

EASTERN MICROWAVE, INC.

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION OF MOTION PICTURE ASSOCIATION OF AMERICA, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Motion Picture Association of America, Inc. ("MPAA") respectfully moves the Court for leave to file the attached brief *amicus curiae* supporting the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit. Counsel for the petitioners has consented to the filing of the attached brief. MPAA was unable to obtain consent from counsel for the respondents.

The interest of MPAA is set forth at pages 1 and 2 of the attached brief. In summary, MPAA represents companies engaged, either directly or indirectly, in the distribution of copyrighted program material to cable television systems and

local television stations for broadcast within discrete television markets. The decision of the court of appeals would permit commercial enterprises to sell to cable systems program packages consisting of television broadcast programming, including works owned by MPAA member companies, without the permission of or compensation to the owners of that programming. This decision is contrary to the explicit statutory policy that royalties should be paid to the creators of programs sold for profit by commercial enterprises, and will result in the loss of substantial royalty revenues to MPAA member companies.

The MPAA brief discusses the decision of the court of appeals from the point of view of producers and distributors of feature films and recorded television program material. This is an interest that the petitioner as a copyright owner of sporting events does not represent or fully discuss.

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BRIEF AMICUS CURIAE OF MOTION PICTURE ASSOCIATION OF AMERICA, INC. IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Motion Picture Association of America, Inc. ("MPAA") respectfully submits this brief *amicus curiae* in support of the Petition for a Writ of Certiorari.

INTEREST OF THE AMICUS

MPAA is a national trade association representing producers and distributors of theatrical feature films and television program material. It's members include:

Columbia Pictures Industries, Inc.

Embassy Communications

Metro-Goldwyn-Mayer Film Co.
Orion Pictures Corporation
Paramount Pictures Corporation
20th Century-Fox Film Corporation
United Artists Corporation
Universal Pictures
Walt Disney Productions
Warner Bros. Inc.

The MPAA member companies are engaged, either directly or indirectly, in the distribution of program material to cable systems. Substantial revenues are received by the MPAA companies for the cable distribution rights to their programs.

The MPAA member companies also license their programs to local television stations for broadcast within discrete television markets. Many of these programs are intercepted from the broadcast signals of WOR-TV and WCBS-TV by respondent Eastern Microwave, Inc. ("EMI") and distributed to cable systems via satellite. EMI receives substantial payments from cable systems for the programs it delivers, but EMI does not compensate program owners or obtain their permission to distribute their programs. Program owners are thereby doubly harmed. First, they do not receive any compensation from EMI for the programs sold by EMI to cable systems. Second, their ability to license these programs directly to broadcast stations and cable systems is significantly reduced.

Disposition of the instant case will vitally affect the interests of MPAA members and program onwers generally insofar as it establishes whether suppliers of broadcast program packages such as EMI must obtain the permission of the copyright owners whose works are marketed to cable systems and compensate those copyright owners from the substantial revenues received from the sale of their property.

ARGUMENT

The question presented in this case is whether program distributors like EMI which sell copyrighted broadcast programming to cable systems, are exempt from copyright liability pursuant to 17 U.S.C. §111(a)(3). This provision exempts from copyright liability the "secondary transmission" of "primary transmissions" by "passive carriers" which have "no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission," and whose activities "consist solely of providing wires, cables, or other communications channels for the use of others."

The district court held that EMI's activities do not fall within the "passive carrier" exemption. The court of appeals reversed.

The decision of the court of appeals is contrary to the statutory objectives and Congressional intent reflected in the 1976 General Revision of Copyright Law, P.L. 94-553, and fails to properly distinguish between "passive carriers" and the activities of EMI.

The 1976 General Revision of Copyright Law for the first time imposed copyright liability for the retransmission of broadcast programs by cable television systems. Cable systems were made liable because Congress concluded:

> that cable systems are *commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material* and that copyright royalties should be paid by cable operators to the creators of such programs. (emphasis added) H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 89 (1976).

EMI is not a cable system. But it is, without doubt, a commercial enterprise whose basic retransmission operations are based on the carriage of copyrighted program material. EMI is paid by its subscribing cable systems for a program package consisting of copyrighted works. The decision of the

court of appeals that EMI is exempt from copyright liability is contrary to the explicit statutory policy that royalties should be paid to the creators of programs sold for profit by commercial enterprises.

The exemption contained in Section 111(a)(3) does not depart from this policy. Rather, it distinguishes carriers whose business consists of providing "communications channels" from other commercial enterprises whose business consists of providing copyrighted program material. Clearly, the activities of EMI fall within the latter category.

EMI provides a *program* service, not a carrier service. It is impossible to distinguish between the service offered by EMI and that offered by cable program distribution networks such as Nickelodeon, a made-for-cable children's channel. Both deliver a package of programs to cable systems which pay for that program package. The major difference between the two is that EMI acquires the programs it sells without authorization from or compensation to program owners, whereas other program distributors obtain their programming directly from program owners who authorize and are compensated for the use of their programs. However, from the standpoint of the cable system customer there is no difference whatsoever between the two services. Each provides a pre-selected package of programs delivered by satellite for which the cable systems pay a fee.

The definitional prerequisite for a communications system to be regarded as a common carrier is that "the system be such that *customers* transmit intelligence *of their own design and choosing.*[1] There is no possible rationale by which EMI can be considered a common carrier under this test.

The cable systems which are the customers of EMI have absolutely no freedom to choose or even influence the "intelligence" which they receive. The program package sold to cable systems was carefully chosen by EMI from available broadcast signals and the only choice the cable system has is whether or not to subscribe to the service that EMI offers.

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[1] *NARUC* v. *FCC*, 533 F. 2d 601, 618 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 992 (1976).

The promotional material distributed by EMI shows that cable systems are offered a specific program package. There is no indication that cable systems have any choice as to what programs they receive, and in fact they have none. From the perspective of the cable system customer, there is not a scintilla of difference between the choice offered by EMI and that offered by non-broadcast program distributors like USA Cable Network, Entertainment and Sports Program Network (ESPN), and Nickelodeon. In each case the only choice involved is whether to subscribe to the program package that is offered. Cable systems are *never* given an opportunity to use these services to receive programs of "their own design and choosing."

Finally EMI has no quasi-public characteristics and does not exert monopoly control over an essential facility or service. These are basic common carrier traits which EMI clearly does not possess.

In sum, Congress has determined that copyright owners should be paid when their works are included in secondary transmissions by commercial enterprises. In the case of cable systems, payment is governed by the terms of a compulsory license. In the case of other commercial enterprises, such as EMI, payment is to be determined in the open marketplace. The decision of the court of appeals would permit EMI to profit from the retransmission of copyrighted program material without compensation to program owners. This is clearly contrary to the policies embodied in the Copyright Act as well as the express language of Section 111(a)(3).

CONCLUSION

For the foregoing reasons, MPAA respectfully urges the Court to grant the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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January 7, 1983

No. 82-957

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v.

EASTERN MICROWAVE, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

OPPOSITION TO MOTIONS OF CBS INC. AND MOTION PICTURE ASSOCIATION OF AMERICA, INC. FOR LEAVE TO FILE BRIEFS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM 1982

DOUBLEDAY SPORTS, INC.,
Petitioner,

v.

EASTERN MICROWAVE, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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OPPOSITION TO MOTIONS OF CBS INC. AND MOTION PICTURE ASSOCIATION OF AMERICA, INC. FOR LEAVE TO FILE BRIEFS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 36.3, Eastern Microwave, Inc. ("EMI"), Respondent in Opposition, opposes the motions of CBS Inc. ("CBS") and the Motion Picture Association of America, Inc. ("MPAA") for leave to file briefs *amicus curiae* supporting the petition for a writ of certiorari.

CBS and MPAA each claims a different economic interest from Petitioner's under the Copyright Act, and seeks to justify additional briefing on that ground. However, despite asserted differences in economic perspective, their essential factual and legal arguments for review do not, and under the Copyright Act could not, differ from those advanced by Petitioner Doubleday

Sports, Inc. Hence, CBS and MPAA's briefs are superfluous to the Court's consideration of the petition. The motions of CBS and MPAA therefore should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rules 28.3 and 36.3 of the Rules of the Supreme Court of the United States, I hereby certify that three copies of the foregoing Opposition to Motions for Leave to File Briefs Amicus Curiae to the United States Court of Appeals for the Second Circuit were mailed via First Class, United States Mail, postage prepaid to the following counsel on this 14th day of January, 1983.

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